FEDERAL REGISTER

Vol. 84 Tuesday,

No. 98 May 21, 2019

Pages 22943–23438

OFFICE OF THE FEDERAL REGISTER

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Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

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NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

2 CFR Part 3187

45 CFR Parts 1181, 1182 and 1184

RIN 3137–AA25

Freedom of Information Act Regulations and Additional Incidental Technical Amendments to Other IMLS Regulations

AGENCY: Institute of Museum and Library Services (IMLS or Institute), National Foundation on the Arts and the Humanities (NFAH).

ACTION: Final rule.

SUMMARY: This rule amends the regulations the Institute of Museum and Library Services (IMLS) follows in processing records under the Freedom of Information Act, in part in compliance with the FOIA Improvement Act of 2016, and otherwise also revises all current IMLS regulations to reflect the agency's change of address and update outdated information. The revisions to IMLS FOIA regulations clarify and update procedures for requesting information from IMLS and procedures that IMLS follows in responding to requests from the public. The revisions to other IMLS regulations would revise the citation to the Age Discrimination Act of 1975, reflect the agency's change of address, and update outdated information.

DATES: This rule is effective May 20, 2019.

FOR FURTHER INFORMATION CONTACT: Susan B. Gerson, Associate General Counsel, Institute of Museum and Library Services, (202) 653–4712.

SUPPLEMENTARY INFORMATION:

I. Background Information—FOIA and Technical Amendments

On December 26, 2018 (83 FR 66163), the Institute published a proposed rule to revise its FOIA regulations in accordance with the FOIA Improvement Act of 2016 and otherwise reflect the agency's change of address and update outdated information. IMLS also proposed to make minor technical amendments to all other IMLS regulations to reflect the agency's change of physical address, update contact information, and otherwise facilitate readability. In the interests of economy of administration, and because all of the regulations proposed to be removed are outdated and the technical amendments are minor, they are included in this one rulemaking.

II. Discussion of the Final Rule

A. Non-Discretionary Changes Required by the FOIA Improvement Act of 2016

In compliance with the FOIA Improvement Act of 2016, the Institute has made changes to its regulatory amendments to update information and otherwise make technical amendments to improve the clarity of the Institute's regulations.

B. Response to Comment and Changes From the Proposed Rule

In total, the Institute received one public submission to its proposed rule. The Institute has given due consideration to the comment received and has made one modification to the rule, as discussed below.

1. Comments on Proposed 45 CFR 1184.1(b) (the purpose and scope of these IMLS regulations) and 1184.2(c) (IMLS's general policies with respect to FOIA).

The commenter suggested that IMLS remove all reference to the OMB Guidelines, including such references made in proposed 45 CFR 1184.1(b) and 45 CFR 1184.2(c), because the commenter submits that the OMB Guidelines are no longer authoritative. The Institute has considered this suggestion and determined that proposed 45 CFR 1184.1(b) and 45 CFR 1184.2(c) adequately replaces the language in the original 45 CFR 1184.1(b) and 45 CFR 1184.2(c).

The revised language's reference to the OMB Guidelines are general references to the overall guidelines; and such guidelines remain in force, continuing to generally apply to agency FOIA regulations. These references to the OMB Guidelines in IMLS's general FOIA regulation provisions at proposed 45 CFR 1184.1(b) and 45 CFR 1184.2(c) also are consistent with the Justice Department's Office of Information Policy Template for Agency FOIA Regulations and consistent with the language used by many other government agencies, including the Department of Justice, which provides interagency leadership on FOIA matters. *See* 28 CFR 16.1.

2. Comments on Proposed 45 CFR 1184.2(c)(8) (Definitions; Representative of the News Media).

The commenter suggested that the Institute revise its definition of Representative of the News Media at 45 CFR 1184.2(c)(8), to remove the outdated ''organized and operated'' definition and replace it with an updated one tracking the statutory language. The Institute has considered this suggestion and determined that it will revise the language in current 45 CFR 1184.2(c)(8) to comport with a definition of Representative of the News Media which more squarely comports with the FOIA, as amended. More specifically, the Institute will adopt the model definition of Representative of the News Media as delineated in the Justice Department's Office of Information Policy Template for Agency FOIA Regulations. Because this change is in line with the language used by many other government agencies, including the Department of Justice, the Institute implements this revision without the need of formal notice and comment. *See* 28 CFR 16.10(b)(6).

The commenter further suggested that the Institute supplement its regulations definition of Representative of the News Media to include that: (a) A requester's eligibility as a Representative of the News Media should be assessed with a focus on the requester rather than the nature of the information requested, (b) distinct works should include, as an example, a substantive press release, which applies editorial skills to raw material, and (c) examples of news media entities should be non-exhaustive, to include evolving news media formats. The Institute has considered these suggestions and determined that the revised 45 CFR 1184.2(c)(8) defining a Representative of the News Media is sufficiently detailed,

focuses on the person or entity rather than the information requested, and provides examples in a manner that is non-exhaustive. The Institute therefore has determined that the model language set forth in the revised 45 CFR 1184.2(c)(8) adequately replaces the language in the original 45 CFR 1184.2(c)(8).

III. Regulatory Analyses

Regulatory Planning and Review (E.O. 12866)

Under Executive Order 12866, the Institute must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rule updates outdated information and makes technical amendments to the Institute's regulations. As such, it does not impose a compliance burden on the economy generally or on any person or entity. Accordingly, this rule is not a ''significant regulatory action'' from an economic standpoint, and it does not otherwise create any inconsistences or budgetary impacts to any other agency or Federal Program.

Regulatory Flexibility Act

Because this rule would amend outdated regulations and make certain technical amendments, the Institute has determined in Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) review that this rule will not have a significant economic impact on a substantial number of small entities because it simply makes technical amendments and amends outdated regulations.

Paperwork Reduction Act

This rule is exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. 3501–3521), since it amends existing outdated regulations and makes only technical amendments. An OMB form 83–1 is not required.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501–1571), this rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, or tribal governments, or by the private sector, of $100 million or more as adjusted for inflation) in any one year.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), of the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications. No rights, property or compensation has been, or will be, taken. A takings implication assessment is not required.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, this rule does not have federalism implications that warrant the preparation of a federalism assessment.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Institute has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Consultation and Coordination With Indian Tribes (E.O. 13175)

In accordance with Executive Order 13175, the Institute has evaluated this rule and determined that it has no potential negative effects on federally recognized Indian tribes.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

List of Subjects

2 CFR Part 3187

Federal awards, Nondiscrimination.

45 CFR Part 1181

Accessibility, Employment, Nondiscrimination.

45 CFR Part 1182

Privacy Act.

45 CFR Part 1184

Freedom of Information Act.

For the reasons stated in the preamble and under the authority of 20 U.S.C. 9101 *et seq.,* the Institute of Museum and Library Services amends 2 CFR part 3187 and 45 CFR parts 1181, 1182, and 1184 as follows:

Title 2—Grants and Agreements

PART 3187—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for part 3187 continues to read as follows:

Authority: 20 U.S.C. 9101–9176, 9103(h); 20 U.S.C. 80r–5; 2 CFR part 200.

■ 2. In § 3187.12, in the table in paragraph (a), revise the entry for ''Discrimination on the basis of age'' to read as follows:

§ 3187.12 Federal statutes and regulations on nondiscrimination.

(a) * * *

Subject	Statute
* * * * * * *	
Discrimination on the basis of age	The Age Discrimination Act of 1975 (42 U.S.C. 6101–6107).

* * * * *

Title 45—Public Welfare

PART 1181—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE INSTITUTE OF MUSEUM AND LIBRARY SERVICES

■ 3. The authority citation for part 1181 continues to read as follows:

Authority: 29 U.S.C. 794.

■ 4. Amend § 1181.170 by revising the second sentence of paragraph (c) to read as follows:

§ 1181.170 Compliance procedures.

* * * * *

(c) * * * Complaints may be sent to Director, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC, 20024–2135.

* * * * *

PART 1182—IMPLEMENTATION OF THE PRIVACY ACT OF 1974

■ 5. The authority citation for part 1182 continues to read as follows:

Authority: 5 U.S.C. 552a(f).

■ 6. Revise § 1182.3 to read as follows:

§ 1182.3 Inquiries about the Institute's systems of records or implementation of the Privacy Act.

Inquiries about the Institute's systems of records or implementation of the Privacy Act should be sent to the following address: Institute of Museum and Library Services; Office of the General Counsel, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135.

§ 1182.5 [Amended]

■ 7. Amend § 1182.5 by removing ''Committee on Government Reform of the House of Representatives'' and adding in its place ''United States House Committee on Oversight and Government Reform'' and by removing ''Committee on Governmental Affairs of the Senate'' and adding in its place ''United States Senate Committee on Homeland Security and Governmental Affairs.''

§ 1182.13 [Amended]

■ 8. Amend § 1182.13 by:

■ a. In paragraph (a) introductory text, adding the word ''will'' between the words ''Institute'' and ''not;'' and

■ b. In paragraph (a)(2), removing ''45 CFR part 1100'' and adding in its place ''45 CFR part 1184''.

§ 1182.15 [Amended]

■ 9. In § 1182.15, amend paragraph (a)(3) by removing ''1182.1'' and adding in its place ''1182.2''.

■ 10. Revise the heading for § 1182.16 to read as follows:

§ 1182.16 Procedures to ensure that Institute employees involved with its systems of records are familiar with the requirements of the Privacy Act.

PART 1184—IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

■ 11. The authority citation for part 1184 continues to read as follows:

Authority: 5 U.S.C. 552.

■ 12. Revise § 1184.1 to read as follows:

§ 1184.1 What are the purpose and scope of this part?

(a) This part describe how the Institute of Museum and Library Services (IMLS) processes requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended. The regulations in this part apply only to records that are both:

(1) Created or obtained by IMLS; and

(2) Under the agency's control at the time of the FOIA request.

(b) The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Act Schedule and Guidelines published by the Office of Management and Budget (the ''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under 45 CFR part 1182 as well as under this part.

■ 13. Amend § 1184.2 by revising paragraphs (a) and (b), (c) introductory text, (c)(8) and (10), the second sentence of (c)(11), and (c)(12) to read as follows:

§ 1184.2 What are IMLS's general policies with respect to FOIA?

(a) *Presumption of openness.* IMLS administers the FOIA with a presumption of openness. Under this presumption, IMLS makes discretionary disclosures of records whenever such disclosure would not foreseeably harm an interest protected by a FOIA exemption or otherwise be prohibited by law.

(b) *Records available at the IMLS FOIA Electronic Reading Room.* IMLS makes records available on its website Reading Room in accordance with 5 U.S.C. 552(a)(2), as amended, as well as other records that have been requested three or more times or that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. IMLS establishes categories of records that can be disclosed regularly and proactively identifies and discloses additional records of interest to the public. To save time and money, and maximize efficiency, IMLS strongly urges individuals who seek information from IMLS to review documents available at the IMLS FOIA Electronic Reading Room before submitting a FOIA request.

(c) *Definitions.* For purposes of this part, IMLS adopts all of the terms defined in the Freedom of Information Act, and the OMB Guidelines, unless otherwise defined in this part.

* * * * *

(8) *Representative of the news media.* Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, agencies can also consider a requester's past publication record in making this determination. Agencies will advise requesters of their placement in this category.

* * * * *

(10) *Review.* The examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. Review time includes all of the processing that is necessary to prepare any record for disclosure, including, as applicable, redacting portions of the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential business information

submitter under § 1184.9 but it does not include time spent resolving general legal or policy issues regarding the applicability of exemptions.

(11) * * * Search time includes page-by-page or line-by-line identification of information within records; and the reasonable efforts expended to locate and retrieve information from both hard copy and electronic records.

(12) *Working day.* A regular Federal work day constitutes a working day. It does not include Saturdays, Sundays, or Federal holidays.

■ 14. Amend § 1184.3 by revising paragraphs (a) and (b) to read as follows:

§ 1184.3 How do I request records?

(a) *Where to send a request.* You may make a FOIA request for IMLS records by completing the online prompts in the FOIA Online Portal via FOIA.gov or via *https://www.imls.gov/about/foia-request/form* or by sending an email to *foia@imls.gov* or by submitting a request in writing via regular U.S. Mail addressed directly to the FOIA Public Liaison, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Requests may also be sent in writing via facsimile to the FOIA Officer at (202) 653–4625.

(b) *Form of request.* Your FOIA request need not be in any particular format, but it must be in writing, include your name and mailing address, and should be clearly identified as a Freedom of Information Act or ''FOIA'' request. You must describe the records you seek with sufficient specificity to enable the agency to identify and locate the records, including, if possible, dates, subjects, titles, or authors of the records requested. Before submitting a request, you may contact IMLS's FOIA contact or FOIA Officer to discuss the records you seek and to receive assistance in describing the records. If upon receiving your request IMLS determines that it does not reasonably describe the requested records, IMLS will advise you what additional information is required to perfect your request, or why your request is otherwise insufficient. You should also indicate if you have a preferred form or format in which you would like to receive the requested records.

* * * * *

■ 15. Amend § 1184.4 by adding paragraph (c) to read as follows:

§ 1184.4 When will I receive a response to my request?

* * * * *

(c) *Expedited processing.* (1) IMLS must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted as required by § 1184.6.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, IMLS may waive the formal certification requirement.

(4) IMLS must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, IMLS must act on any appeal of that decision expeditiously.

* * * * *

■ 16. Amend § 1184.5 by:
■ a. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f);
■ b. Adding a new paragraph (c); and
■ c. In newly redesignated paragraph (f):
■ i. Removing ''FOIA Officer'' and adding in its place ''FOIA Public Liaison;'' and
■ ii. Adding a sentence at the end of the paragraph.

The additions read as follows:

§ 1184.5 How will my request be processed?

* * * * *

(c) *Estimated dates of completion and interim responses.* Upon request, IMLS will provide an estimated date by which the agency expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, IMLS may provide interim responses, releasing the records on a rolling basis.

* * * * *

(f) * * * In addition, IMLS will provide information about the mediation services provided by the Office of Government Information Services of the National Archives and Records Administration.

■ 17. Amend § 1184.6 by:
■ a. Revising paragraph (a); and
■ b. In paragraph (b), removing the term ''Office of Government Services (OGIS)'' and adding in its place ''Office of Government Information Services.''

The revision reads as follows:

§ 1184.6 How can I appeal a denial of my request?

(a) *Submission of an appeal.* If your FOIA request has been denied in whole or in part, or if the agency has not found any records in response to your request, you may file an appeal no later than ninety (90) calendar days following the date of the notification of denial. Your appeal must include a description of the initial request, the reason for the appeal, and why you believe the agency's response was incorrect. Your appeal must be in writing, signed, and filed with the IMLS Director, c/o Office of the General Counsel, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Appeals may also be sent via email to *foia@imls.gov,* or via facsimile to (202) 653–4625.

* * * * *

■ 18. Amend § 1184.7 by revising paragraphs (f)(3)(ii) and (g) to read as follows:

§ 1184.7 How will fees be charged?

* * * * *

(f) ***

(3) ***

(ii) When IMLS requests an advance payment, the time limits described in section (a)(6) of the FOIA will begin only after IMLS has received advanced full payment in full.

(g) *Failure to comply.* In the absence of unusual or exceptional circumstances, IMLS will not assess fees if the agency fails to comply with any time limit set forth in this part, unless

the agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request.

* * * * *

■ 19. Amend § 1184.8 by revising the second sentence of paragraph (b) to read as follows:

§ 1184.8 How can I address concerns regarding my request?

* * * * *

(b) * * * If you seek information regarding OGIS and/or the services it offers, please contact OGIS directly at Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740–6001, Email: *ogis@nara.gov,* Phone: (202) 741–5770 or toll free (877) 684–6448, Fax: (202) 741–5769. * * *

§ 1184.9 [Amended]

■ 20. Amend § 1184.9(b)(2) by adding a comma after ''local''.

Dated: May 13, 2019.

Kim Miller,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2019–10212 Filed 5–20–19; 8:45 am]

BILLING CODE 7036–01–P

OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1303

RIN 0348–AB42

Freedom of Information Act

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Final rule.

SUMMARY: OMB is issuing a final rule revising its regulations implementing the Freedom of Information Act (FOIA). These regulations are being revised to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 as well as streamline OMB's FOIA regulations by structuring the text of the regulation in an order more similar to that of the Department of Justice's (DOJ) FOIA regulation and the DOJ Office of Information Policy's (OIP) *Guidance for Agency FOIA Regulations,* thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations are being updated to reflect developments in case law regarding the FOIA.

DATES: The final rule is effective June 20, 2019.

FOR FURTHER INFORMATION CONTACT: Dionne Hardy, Office of Management and Budget, Office of General Counsel, at *OMBFOIA@omb.eop.gov,* 202–395–FOIA.

SUPPLEMENTARY INFORMATION:

Background: On August 23, 2018, OMB proposed revisions (43 FR 42610–42618) to its existing regulations under the CFR at part 1303 governing requests and responses for agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These revisions are now being finalized to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 (Pub. L. 110–81) and the FOIA Improvement Act of 2016 (Pub. L. 114–185) as well as streamline OMB's FOIA regulations by structuring the text of the regulation in an order more similar to that of DOJ's FOIA regulation and the DOJ Office of Information Policy's (OIP) *Guidance for Agency FOIA Regulations* (''the DOJ FOIA Regulation Guidance''), thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations are updated to reflect developments in the case law. OMB proposed these revisions after conducting the review made in accordance with section 3(a) of the FOIA Improvement Act of 2016, which provides that each agency ''shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under [the FOIA].'' With this final rule OMB is adopting the revision to its FOIA regulation as previously proposed, with amendments included in response to public comments regarding OMB's proposal.

Public Comments

Interested persons were afforded the opportunity to participate in the rulemaking process through submission of written comments to the proposed rule during the 30-day public comment period. OMB received twelve public submissions in response to the proposed rulemaking. Due consideration was given to each submission received and a determination was made that four of the submissions were relevant comments to the proposed rule and that the remaining eight submissions were unrelated to the subject matter of the proposal. Overall, OMB adopted all four of these relevant comments in part. Three of these four comments contained discussion of multiple sections of the proposed revised rule. Discussion of each of the comments and OMB's responses follows in order of the relevant section of the revised regulation.

1. Section 1303.21

One commenter suggested a change to this section's provision stating how a requester can access certain information about a person other than the requester which would otherwise be withheld. OMB's proposal provided that if the requester includes authorization for full disclosure given by the individual whom the information is about, or a death certificate or other proof that that person is deceased, the requester can receive ''greater access'' to the information about that individual. The commenter suggested that the rule should limit the people for whom ''greater access'' can be withheld by OMB in the first place, without such proof or authorization, to only people who are not ''government officials.'' The commenter suggested that this change would facilitate ''open access to government records about government officials.''

For this section, OMB used the text found in the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. OMB's purpose for including this provision was to facilitate greater access to information which is permitted to be withheld by an agency under exemptions b(6) and b(7)(C) in the FOIA statute which protect against unwarranted invasions of personal privacy.

There is no basis in the FOIA statute allowing or directing agencies to make a distinction between ''government officials'' and other people who are the subject of requested information when it comes to what information will be released. Indeed, the FOIA's exemptions from release for personal privacy interests (5 U.S.C. 552(b)(6), (7)(C)) are often invoked to withhold sensitive personal information of government employees. OMB's rule directs requesters to provide specified documentation showing that no invasion of personal privacy would result from the release of the requested records (*i.e.,* because the subject of the personal information has authorized the release or is deceased). Personal information is protected by exemption b(6) regardless of whether the subject of the information is a government official. For these reasons, OMB declines to make the change requested to distinguish government officials.

2. Section 1303.22

The same commenter suggested that OMB remove this section's proposed statement of the requirement that ''requesters must describe the records sought in sufficient detail to enable

OMB personnel to locate them with a reasonable amount of effort.'' The commenter stated that a requirement that requesters provide ''sufficient detail'' in their requests is not required by the FOIA statute and removing this requirement ''avoids the unnecessary delays introduced by'' such a requirement. The commenter linked the proposed rule's requirement for sufficient detail in FOIA requests with language in OMB's regulation guiding OMB to conduct searches efficiently and without unnecessary expense.

For this section, OMB used the text found in the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. OMB's purpose for including this language was to reflect prevailing case law that has consistently held that a request failing to provide sufficient detail or particular specificity may be a basis for an agency to validly reject the request. *See Judicial Watch, Inc.* v. *Exp.-Imp. Bank,* 108 F. Supp. 2d 19, 27–28 (D.D.C. 2000) (agency motion for summary judgment based on requester's failure to exhaust administrative remedies was granted because requester ''fail[ed] to state its request with sufficient particularity.''). Failing to provide sufficient detail in a request is one of several ways a plaintiff may fail to ''reasonably describe'' the records sought. *See James Madison Project* v. *CIA,* No. 08–1323, 2009 U.S. Dist. LEXIS 78671, *8 (E.D. Va., August 31, 2009).

OMB's revision provides ways for requesters to prevent a FOIA request from being deficient for failure to reasonably describe the records sought, both before and after the request is submitted. Moreover, OMB's revision provides requesters an additional accommodation not required by the FOIA statute, namely that OMB will contact requesters for clarification in cases where the request fails to reasonably describe the records sought.

Finally, OMB does not intend for this provision to change OMB's procedures for searching for records in response to FOIA requests. The text of § 1303.91 of OMB's revised regulation includes text that is unchanged from OMB's previous rule (formerly in § 1303.40) that states that OMB will use the ''most efficient and least costly methods'' in complying with requests for responsive documents. For these reasons, OMB declines to make the suggested change to this section.

3. Section 1303.30

The same commenter opposed the inclusion of parts (a) and (b) of this new section stating that they would curtail the processing of valid FOIA requests. Specifically, the commenter stated that the provisions for when searches are cut off from including later, newly created records, and for exclusion of records from searches when those records have been transferred to the control of the National Archives and Records Administration (NARA) may make the request process more difficult. The comment notes that the proposed regulation's provision in part (a) of a search cutoff date ''does not delineate the search cutoff in its text.''

For part (a) of this section, OMB used text found in the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. This section is intended to provide notice to requesters that OMB uses the date the search is begun by agency staff as the search cutoff date, designating records created after that date as not responsive to the request. This procedure is favored by courts over the use of a date-of-receipt search cutoff policy. See, *e.g., McGehee* v. *CIA,* 697 F.2d 1095, 1104 (D.C. Cir. 1983) (holding that a date-of-search cutoff is more reasonable because it ''results in a much fuller search and disclosure'' than does a date-of-request cut-off). Using the date that the search begins is more reasonable than a later date because one of the first steps in the search is often a request for collection of documents currently in possession of agency staff or in file systems. A later cutoff would potentially require multiple successive requests for additional documents in response to the same FOIA request.

Additionally, this comment opposed inclusion of part (b) of this section, which provides notice that records that have been transferred to the control of NARA are not accessible by submitting a FOIA request to OMB. The commenter requested that this provision be removed because ''it does not make explicit that recent records created under the Obama Administration are no longer within the OMB's control for FOIA request purposes.''

OMB chose to add both paragraph (a) and paragraph (b) to the regulation in order to provide requesters some notice where there previously was none, of the possible limits of the scope of searches conducted by OMB in response to FOIA requests. In the case of paragraph (b), OMB intends this provision to notify requesters of a limitation of the FOIA which commonly affects the scope of searches conducted by OMB. A listing of particular instances of the transfer of records to NARA such as happened with emails at the end of the Obama Administration, as requested by this comment, was not included in the rule because such changes to OMB's records holdings typically happen too frequently to include an up-to-date listing of OMB's records retention schedules in OMB's regulation. OMB's records holdings, including documentation of the Obama Administration email accession to NARA are publicly listed on NARA's website for Records Control Schedules of agencies here: *https://www.archives.gov/records-mgmt/rcs/schedules/index.html?dir=/executive-office-of-the-president/rg-0051.* For these reasons, OMB declines to make the change requested.

4. Section 1303.40(a)

One commenter pointed out that this section's statement of when the FOIA Officer is to determine whether it is appropriate to grant requests and what the notification of that determination back to the requester must include does not list the same items that were listed in the D.C. Circuit's opinion in *Citizens for Responsibility & Ethics in Washington* v. *FEC,* 711 F.3d 180 (D.C. Cir. 2013), including, among other items, the right of the requester to appeal the agency's determination. In that case, the D.C. Circuit gave a description of the minimum requirements for an agency's determination regarding a FOIA request in order for that communication to be effective to require a requester to exhaust their administrative remedies prior to filing suit over that FOIA request pursuant to the FOIA's provisions at 5 U.S.C. 552(a)(6)(C).

OMB does not intend for this provision in its regulation to change the statutory requirements for OMB to provide notification of the agency's determination of whether to comply with a request in the FOIA at 5 U.S.C. 552(a)(6)(A). Nor does OMB intend for this section to reflect a comprehensive description of the information that the FOIA requires to be included in a notification of a determination of a request, which can be found by examining the FOIA itself. This section only intends to briefly describe the timing of responses to a request, including the basic 20-day time period and the requirement of immediate notification to the requester of a determination regarding the request. For these reasons, OMB declines to make the requested change.

The same commenter stated that this section includes an erroneous method for calculating the date of receipt of a FOIA request. Specifically, the commenter stated that the proposed rule's provision that ''the 20-day period, as used herein, shall commence on the

date on which the FOIA Officer or the FOIA Public Liaison first receives the request'' conflicts with the FOIA's requirement that the 20-day period commences no later than ten days after the request is first received by any component of the agency designated to receive FOIA requests.

OMB does not intend for this provision to modify the statutory requirement that the 20-day period should commence no less than ten days after the request is first received by the agency. OMB agrees with the commenter that this section will more accurately reflect OMB's duties under the FOIA by including an additional clause which is included in the DOJ OIP's *Guidance for Agency FOIA Regulations.* Specifically, OMB has added to this subsection the following text: ''but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests.''

5. Section 1303.40(d)

Four commenters raised concerns that this section of the proposal's provision regarding the aggregating of requests for the purposes of triggering the FOIA's provision for extending the time period for the agency to respond to FOIA requests in cases of unusual circumstances stated in the FOIA at 5 U.S.C. 552(a)(6)(B), are overly broad. Each of the comments opposed OMB's proposal of a 45-day period within which OMB would presume requests can be aggregated if other circumstances listed in the regulation and statute apply. One commenter stated that this provision would extend OMB's response time for requests ''from 20 days to 40 days, or longer.''

Another commenter disagreed with OMB's explanation for the proposed time period in the proposal's summary of changes, that the 45-day period accounts for the FOIA statute's provision of ten working days for routing of FOIA requests, 20 days for an initial response, and 20 days for an appeal response, and suggested that the time period for appeal responses should be ignored because appeals are relatively rare. This comment also noted that most agencies have a 30-day aggregation period included in the fee-calculation portion of their regulations in accordance with the DOJ OIP's *Guidance for Agency FOIA Regulations.* Another commenter stated that this section would have set an overly broad standard for aggregating requests by omitting the requirement of the FOIA's aggregation provision (5 U.S.C. 552(a)(6)(B)(iv)) that aggregated requests involve ''clearly related matters.'' Another commenter stated more generally that this provision was overly broad because it did not stipulate that the requests must ''otherwise satisfy the unusual circumstances'' standard in the FOIA in order to be eligible for aggregation.

After careful consideration of these comments, OMB agrees that including the proposed 45-day period for aggregating requests could lead to confusion and potentially overly broad application of the FOIA's aggregation provision for the agency to claim ''unusual circumstances'' regarding a request. As proposed, the regulation would not have affected the 20-day time limit for requests, and therefore would only be applied to claim the ''unusual circumstances'' timing provision of the FOIA on the later of multiple aggregated requests when the earlier request's 20-day time period had expired. However, OMB agrees with commenter's arguments that the proposed provision could have been misinterpreted, leading to unnecessary confusion. Further, OMB agrees with commenters who suggested that OMB should revise this section to align with the corresponding provision of the DOJ OIP's *Guidance for Agency FOIA Regulations.* Doing so will add to uniformity across regulations and reduce the potential for confusion and delays in processing FOIA requests.

For these reasons, OMB is adopting changes to this section suggested by the comments. Specifically, OMB has amended this section to align with the DOJ OIP's *Guidance for Agency FOIA Regulations.*

6. Section 1303.70

One commenter suggested that a provision of this section could be confusing to requesters who wish to seek review by a court of an agency's adverse determination. Specifically, the comment highlighted the final sentence of this section in the proposal, which states, ''[b]efore seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal.'' The commenter noted that the FOIA statute at 5 U.S.C. 552(a)(6)(C)(i) provides that a requester ''shall be deemed to have exhausted [her or his] administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions. . . .'' The comment concluded that the regulation's statement of the requirement that that requester to appeal an adverse ruling before seeking review by a court conflicts with the FOIA's provision granting requesters leave to seek court review when the 20-day time limit for agency responses expires, regardless of whether the requester has appealed their case.

For the provision of the rule highlighted by this comment, OMB used the text found in the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification. This provision was included in OMB's rule to give notice to requesters of the uniform treatment by courts of the FOIA as requiring plaintiffs who are challenging an agency's adverse determinations in court to first exhaust their administrative remedies by appealing to the agency for administrative review. *See, e.g., Wilbur* v. *CIA,* 355 F.3d 675, 677 (D.C. Cir. 2004). OMB agrees with the commenter that in those cases where an agency has not issued a determination when the 20-day time limit has passed, the FOIA's constructive exhaustion provision, cited by this comment, applies unless and until the agency does issue a determination. *See Judicial Watch, Inc.* v. *Rossotti,* 326 F.3d 1309, 1310 (D.C. Cir. 2003) (''A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the request within twenty days. If the agency responds to the request after the twenty-day statutory window, but before the requester files suit, the administrative exhaustion requirement still applies.''). This provision of the proposed rule does not concern situations where an agency has not issued an adverse determination and therefore does not conflict with the provision of the FOIA statute highlighted in the comment. For these reasons, OMB declines to make the change requested by this comment.

7. Section 1303.80

One commenter advised that this section's reference to NARA's General Records Schedule (GRS) 14 should be changed to ''GRS 4.2.'' The commenter noted that NARA's GRS 14 was updated to ''GRS 4.2'' in January 2017. OMB agrees with this comment and has made the requested change in the rule.

8. Section 1303.90(j)

One commenter requested a change to OMB's definition of ''news'' for purposes of applying the FOIA's reduced fees for news media requesters. Specifically, the requester asked that OMB amend the part of the definition of ''news'' that provides examples of news-media entities by amending the parenthetical phrase referring to periodicals which says ''(but only in those instances when they can qualify

as disseminators of 'news')." The commenter stated that this text improperly limits the definition of "news" and therefore the definition of "representative of the news media" in contradiction with the FOIA. Specifically, the commenter expressed concerns that the use of the phrase "in those instances" suggests that OMB will determine on a case-by-case basis, whether a requester qualifies for this provision. Furthermore, the commenter noted that the FOIA statute includes a definition of "news" that differs from the one in OMB's prior rule and proposed revision.

OMB did not propose changes to this provision in the regulation in its rule proposal but it did generally propose to make changes to comply with updates to the FOIA statute. Definitions of "representative of the news media" and "news" were added to the FOIA statute as part of the OPEN Government Act amendments made to the law in 2007. The definition in OMB's prior regulation predated the 2007 FOIA amendments and closely adhered to the definition originally created by OMB and included in OMB's "Uniform Freedom of Information Fee Schedule and Guidelines" in 1987. OMB agrees with the requester that OMB must comply with the definitions of "news" and "news media requester" set out in the FOIA, and further agrees that continued textual deviations from the statutory definition in OMB's regulation may add confusion and uncertainty for requesters who may seek reduced fees for this category of requests. Therefore, OMB has revised the text of this section by aligning the definition "news" with the statutory definition in the FOIA. OMB intends that this change will relieve requesters of any uncertainty that OMB will adhere to the FOIA's statutory definition of "news" when assessing fees.

9. Section 1303.91(b)

One commenter expressed confusion with a sentence in this subsection which included "*i.e.*" but the phrase following it did not appear to be connected with the phrase preceding it. OMB had inadvertently omitted language from this sentence which would have illustrated the concept of an "initial review" of a record which is drawn from the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification. Including this text will correct a typographical error and will also provide information to requesters about the record review process, while promoting uniformity of FOIA regulations across agencies. For these reasons, OMB has added the illustrative phrase found in that guidance to this subsection of the regulation.

10. Section 1303.91(g)

One commenter advised that this section as proposed did not appear to distinguish between "all other" requesters and the educational institutions, noncommercial scientific institutions, and representatives of the news media with regard to charges for search time. The commenter noted that the FOIA states at 5 U.S.C. 552(a)(4)(A)(ii) that educational, non-commercial scientific institution, and news media requesters should not be charged search fees, and should only be charged duplication fees.

OMB does not intend to omit this overall distinction in the FOIA regarding search fees in its rule revision and both OMB's proposal and final rule include the general distinction for fees to be charged to these groups in § 1303.91(a) and (b), as well as 1303.92(a) through (c). Section 1303.91(g) of OMB's rule states that the first 100 pages of duplication and the first two hours of search time will be provided without charge to non-commercial requests.

For this subsection OMB used text similar to that found in the DOJ OIP's *Guidance for Agency FOIA Regulations,* which also does not make its distinction regarding these restrictions on assessing fees with regard explicitly to educational, non-commercial scientific institution, and news media requesters. Instead, the rule provides the benefit of this restriction on the charging of fees to a category of requests that includes "all requests other than those seeking documents for a commercial use."

Because requests for "commercial use" are explicitly excluded from each of the above-listed special requester categories, the category "non-commercial requests" necessarily includes all requests that would be in any of the above listed requester categories. Therefore, it would be redundant and potentially confusing to further stipulate in the regulation that the above listed categories of requesters should also receive the benefit of this subsection. For this reason, OMB declines to make the requested change to this section.

11. Section 1303.92

One commenter noted incorrect cross references included in this section intended to point to definitions in § 1303.90. Those references have been corrected in this rule.

12. Section 1303.93

One commenter that also commented on the proposal's aggregation provision for purposes of timing of responses to requests (see discussion of comments to § 1303.40 above) stated that its comments equally apply to the rule's provision for aggregating requests for purposes of calculating fees. This commenter stated that the proposed 45-day period for presumption that requests can be aggregated should be reduced to 30 days in order to align with the DOJ OIP's *Guidance for Agency FOIA Regulations.* Additionally this commenter suggested that the rule does not provide guidelines for overcoming a presumption that multiple requests can be aggregated, and also suggested that the regulation could allow the charging of one requester fees incurred in replying to another requester. Finally, this commenter stated that the proposed regulation conflicts with the FOIA's requirement that agencies only charge "direct costs of search, duplication, or review," 5 U.S.C. 552(a)(4)(A)(iv).

OMB agrees with the commenter that using the 30-day period suggested by DOJ OIP will better promote uniformity of FOIA regulations across agencies. OMB disagrees that a version of this section that uses a 30-day time period will allow charging of one requester for work done for another requester. Under this rule, any fee charged will still be a direct cost of the search, processing, and duplication done for that requester's request. OMB also disagrees that more specificity is required regarding how OMB will determine that the presumption that requests can be aggregated has been overcome. OMB will administer this provision within the bounds of the FOIA, while addressing the circumstances of each case to promote the purposes of the statute. This provision has been included in the rule in order to prevent abuse of the FOIA's provision of the first 100 pages of duplication and the first two hours of search time to non-commercial requesters.

For these reasons as well as the same reasons stated in the discussion of the comments to § 1303.40, OMB has revised this section to align with the corresponding provision of DOJ OIP's *Guidance for Agency FOIA Regulations,* including by changing the proposed 45-day period for presumption that requests can be aggregated to a 30-day period. OMB declines to make any of the other changes sought by the commenter.

13. Foreseeable Harm Standard

One commenter suggested that the FOIA's standard for withholding documents based on foreseeable harm should be addressed in OMB's FOIA rule. OMB recognizes that the FOIA Improvement Act of 2016 requires that an agency may withhold information ''only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption'' or ''disclosure is prohibited by law.'' 5 U.S.C. 552(a)(8)(A)(i). However, OMB does not agree that it is necessary to include language confirming OMB's compliance with this standard or a provision requiring adverse agency determinations to include an explanation of foreseeable harms in its rule. For these reasons, OMB declines to make the changes requested in the comment.

14. Final Amendments

OMB has made the following clarifying amendments to the rule in response to comments and on its own.

- Section 1303.1
  - This section was revised to add that this regulation should be read in conjunction with the text of the FOIA.
- Section 1303.40
  - As discussed above, in response to a comment this section was revised to comply with the FOIA by adding the stipulation that the 20-day period for making determinations regarding requests will begin within 10 working days after the request is first received by any component's office that is designated to receive requests.
  - As discussed above, in response to a comment paragraph (d) was revised to remove the proposed 45-day period for presumption that multiple requests can be aggregated and otherwise to align with the DOJ regulation template.
- Section 1303.80
  - As discussed above, in response to a comment this section was revised to update a reference to NARA's General Records Schedule 4.2.
- Section 1303.90(j)
  - As discussed above, in response to a comment this section was revised to align the definition of ''news'' with the definition now included in the FOIA statute.
- Section 1303.91
  - As discussed above, in response to a comment this section is revised with added text to illustrate the concept of an ''initial review'' of a record which is drawn from the DOJ OIP's *Guidance for Agency FOIA Regulations* without modification.
  - Paragraph (b) of this section was amended to clarify that review fees will be charged at the same rate as search fees.
- Section 1303.93(c)
  - This subsection was revised to change the proposed 45-day period for presumption that multiple requests can be aggregated to 30 days and otherwise to align with the DOJ regulation template.

Classification of This Rule Under Relevant Statutes

Regulatory Flexibility Act

OMB, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule and certifies that this rule will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters, and only for certain classes of requesters and when particular conditions are satisfied. Thus, fees assessed by the OMB are nominal.

Executive Orders 12866 and 13771

For purposes of Executive Order (E.O.) 13771 on *Reducing Regulation and Controlling Regulatory Costs,* this rule is not an E.O. 13771 regulatory action because this rule is not a significant regulatory action under section 3(f) of E.O. 12866.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1995

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 5 CFR Part 1303

Administrative practice and procedure, Archives and records, Freedom of information.

For the reasons stated in the preamble, OMB revises 5 CFR part 1303 to read as follows:

PART 1303—PUBLIC INFORMATION PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

Sec.

Authority: 5 U.S.C. 301 and 5 U.S.C. 552, unless otherwise noted.

General

§ 1303.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, and prescribes the rules governing the public availability of Office of Management and Budget (OMB) records. The rules in this subpart should be read in conjunction with the text of the FOIA.

§ 1303.2 Authority and functions.

The general functions of OMB, as provided by statute and by executive

order, are to develop and to execute the budget, oversee implementation of Administration policies and programs, advise and assist the President, and develop and implement management policies for the government.

§ 1303.3 Organization.

(a) The central organization of OMB is as follows:

(1) The Director's Office includes the Director, the Deputy Director, the Deputy Director for Management, and the Executive Associate Director.

(2) Staff Offices include General Counsel, Legislative Affairs, Communications, Management and Operations, and Economic Policy.

(3) Offices that provide OMB-wide support include the Legislative Reference Division and the Budget Review Division.

(4) Resource Management Offices, which develop and support the President's management and budget agenda in the areas of Natural Resources, Energy and Science; National Security; Health; Education, Income Maintenance and Labor; and General Government Programs.

(5) Statutory offices include the Offices of Federal Financial Management, Federal Procurement Policy, Intellectual Property Enforcement Coordinator; E-government and Information Technology; and Information and Regulatory Affairs.

(b) OMB is located in the Eisenhower Executive Office Building, 17th Street and Pennsylvania Avenue NW, and the New Executive Office Building, 725 17th Street NW, Washington, DC 20503. OMB has no field offices. Security in both buildings prevents visitors from entering the building without an appointment.

Proactive Disclosures

§ 1303.10 Availability of proactive disclosures.

OMB makes available records that are required by the FOIA to be made available for public inspection in an electronic format. OMB information pertaining to matters issued, adopted, or promulgated by OMB that is within the scope of 5 U.S.C. 552(a)(2) is available electronically on OMB's website at *www.whitehouse.gov/omb/*. Additionally, for help accessing these materials, you may contact OMB's FOIA Officer at (202) 395–3642.

Requirements for Making Requests

§ 1303.20 Where to send requests.

The FOIA Officer is responsible for acting on all initial requests. Individuals wishing to file a request under the FOIA should address their request in writing to FOIA Officer, Office of Management and Budget, 725 17th Street NW, Room 9204, Washington, DC 20503, via fax to (202) 395–3504, or by email at *OMBFOIA@omb.eop.gov*. Additionally, OMB's FOIA Public Liaison is available to assist requesters who have questions and can be reached at (202) 395–7545 or in writing at the address provided in this section.

§ 1303.21 Requesters making requests about themselves or others.

A requester who is making a request for records about himself or herself pursuant to 5 U.S.C. 552a must comply with the verification of identity requirements as determined by OMB pursuant to OMB's Rules For Determining if an Individual Is the Subject of a Record in 5 CFR 1302.1. Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.,* a copy of a death certificate or an obituary). As an exercise of administrative discretion, OMB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

§ 1303.22 Requirement for providing description of the records sought.

(a) Requesters must describe the records sought in sufficient detail to enable OMB personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the FOIA Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

(b) If, after receiving a request, OMB determines that the request does not reasonably describe the records sought, OMB will inform the requester what additional information is needed and why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Officer or the FOIA Public Liaison. If a request does not reasonably describe the records sought, OMB's response to the request may be delayed.

Responsibility for Responding to Requests

§ 1303.30 Responsibility for responding to requests.

(a) *Search cutoff date.* In determining which records are responsive to a request, OMB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, OMB will inform the requester of that date.

(b) *Transfer of records to the National Archives and Records Administration (NARA).* Permanent records of OMB which have been transferred to the control of NARA under the Federal Records Act are not in the control of OMB and are therefore not accessible by a FOIA request to OMB. Requests for such records should be directed to NARA.

(c) *Consultation and referral.* When reviewing records, OMB will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, OMB will proceed in one of the following ways:

(1) *Consultation.* When records contain information of interest to another agency, OMB typically will consult with that agency prior to making a release determination.

(2) *Referral.* (i) When OMB believes that a different agency is best able to determine whether to disclose the record, OMB will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is best situated to make the disclosure determination. However, if OMB and the originating agency jointly agree that OMB is in the best position to respond regarding the record, then OMB may provide it.

(ii) If OMB determines that another agency is best situated to consider a request, OMB promptly will notify the requestor and inform him of the agency which will be processing his request, except when disclosure of the identity of the agency could harm an interest protected by an applicable FOIA exemption. In those instances, in order to avoid harm to an interest protected by an applicable exemption, OMB will coordinate with the originating agency to seek its views on the disclosability of the record and convey the release determination for the record that is the subject of the coordination to the requester.

Timing of Responses to Requests

§ 1303.40 Timing of responses to requests.

(a) *In general.* Upon receipt of any request for information or records, the FOIA Officer will determine within 20 working days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such request whether it is appropriate to grant the request and will immediately notify the requester of such determination and the reasons therefore and the right of such person to seek assistance from the FOIA Public Liaison. The 20-day period, as used herein, shall commence on the date on which the FOIA Officer or the FOIA Public Liaison first receives the request but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests. OMB may toll this 20-day period either one time while OMB is awaiting information that it has reasonably requested from the requester or any time when necessary to clarify with the requester issues regarding fee assessment. OMB's receipt of the requester's response to OMB's request for information ends the tolling period.

(b) *Multitrack processing.* (1) FOIA requests are placed on one of three tracks:

(i) Track one covers those requests that seek and receive expedited processing pursuant to subsection (a)(6)(E) of the FOIA and in accordance with paragraph (e) of this section;

(ii) Track two covers simple requests;

(iii) Track three covers complex requests.

(2) Whether a request is simple or complex is based on the amount of work or time needed to process the request. OMB considers various factors, including the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. OMB will advise the requester of the processing track in which their request has been placed and provide an opportunity to narrow or modify their request so that the request can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of ''unusual circumstances,'' as defined in the FOIA, and OMB extends the time limit on that basis, OMB will, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, OMB will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing. OMB will alert requesters to the availability of its FOIA Public Liaison, who will assist in the resolution of any disputes between the requester and OMB, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services (OGIS).

(d) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, OMB may aggregate those requests for the purposes of this section when OMB reasonably believes that a requester, or a group of requesters acting in concert, has submitted requests that constitute a single request, that would otherwise satisfy the unusual circumstances specified in this section. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing.* (1) Requests and appeals will be given expedited treatment in cases where OMB determines:

(i) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) There is an urgency to inform the public about an actual or alleged Federal Government activity;

(iii) Failure to respond to the request expeditiously would result in the loss of due process rights in other proceedings; or

(iv) There are possible questions, in a matter of widespread and exceptional public interest, about the government's integrity which effect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for requesting expedited processing. OMB may waive this certification requirement at its discretion.

(4) OMB will decide whether to grant expedited processing and will notify the requester within 10 days after the date of the request. If a request for expedited treatment is granted, OMB will prioritize the request and process the request as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

Responses to Requests

§ 1303.50 Responses to requests.

(a) *Acknowledgements of requests.* OMB will assign an individualized tracking number to each request received that will take longer than ten days to process; and acknowledge each request, informing the requestor of their tracking number if applicable; and, upon request, make available information about the status of a request to the requester using the assigned tracking number, including—

(1) The date on which OMB originally received the request; and

(2) An estimated date on which OMB will complete action on the request.

(b) *Grants of requests.* Once OMB makes a determination to grant a request in full or in part, it will notify the requester in writing. OMB also will inform the requester of any fees charged under § 1303.9 and shall provide the requested records to the requester promptly upon payment of any applicable fees. OMB will inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(c) *Adverse determinations of requests.* In the case of an adverse determination, the FOIA Officer will immediately notify the requester of—

(1) The right of the requester to appeal to the head of OMB within 90 calendar days after the date of such adverse determination in accordance with § 1303.70;

(2) The right of such person to seek dispute resolution services from the FOIA Public Liaison or the OGIS at NARA;

(3) The names and titles or positions of each person responsible for the denial of such request; and

(4) OMB's estimate of the volume of any requested records OMB is withholding, unless providing such estimate would harm an interest protected by the exemption in 5 U.S.C. 552(b).

Confidential Commercial Information

§ 1303.60 Notification procedures for confidential commercial information.

(a) *Definitions.* (1) ''Confidential commercial information'' means commercial or financial information obtained by OMB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) ''Submitter'' means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) OMB will promptly notify a submitter when OMB determines that a pending FOIA lawsuit seeks to compel the disclosure of records containing the submitter's confidential information, or if OMB determines that it may be required to disclose such records, provided:

(i) The requested information has been designated by the submitter as information considered protected from disclosure under Exemption 4 in accordance with paragraph (b) of this section; or

(ii) OMB has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice will describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, OMB may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) OMB determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by law, including regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, OMB will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) Unless OMB specifies a different period, submitters who fail to respond to OMB's notice within 30 days of OMB's notice will be deemed to have consented to disclosure.

(2) If a submitter has any objections to disclosure, it should provide OMB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential. OMB is not required to consider any information received after the date of any disclosure decision.

(3) Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* OMB will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever OMB decides to disclose information over the objection of a submitter, OMB will provide the submitter written notice, which will include:

(1) A statement of the reasons why each of the submitter's disclosure objections were not sustained;

(2) A description of the information to be disclosed or copies of the records as OMB intends to release them; and

(3) A specified disclosure date, at least 30 days after OMB transmits its notice of intent to disclose, except for good cause.

(h) *Requester notification.* OMB will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

Appeals

§ 1303.70 Appeals.

(a) A requester must appeal to the head of OMB in writing within 90 calendar days after the date of such adverse determination addressed to the FOIA Officer at the address specified in § 1303.20. The appeal must include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the Deputy Director, or his designee, within 20 working days. If on appeal the denial is upheld in whole or in part, the written determination will also contain a notification of the provisions for judicial review, the names of the persons who participated in the determination, and notice of the services offered by the OGIS as a non-exclusive alternative to litigation.

(b) OGIS's dispute resolution services is a voluntary process. If OMB agrees to participate in the mediation services provided by OGIS, OMB will actively engage as a partner to the process in an attempt to resolve the dispute. An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation. Before seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal.

Preservation of Records

§ 1303.80 Preservation of records.

OMB will preserve all correspondence pertaining to the requests that it receives under this section, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or NARA's General Records Schedule 4.2. OMB will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

Fees

§ 1303.90 Definitions.

For the purpose of this part, all definitions set forth in the FOIA apply.

(a) The term ''direct costs'' means those expenditures that OMB actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Not included in direct costs are overhead expenses such as costs of space, heating, or lighting the facility in which the records are stored.

(b) The term ''search'' means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(c) The term ''duplication'' means the making of a copy of a document, or of the information contained in it, that is necessary to respond to a FOIA request. Such copies can be in the form of paper, microform, audio-visual materials, or electronic records (*e.g.,* magnetic tape or disk), among others.

(d) The term ''review'' refers to the process of examining documents located

in response to a request to determine whether any portion of any document located is permitted to be withheld. It also refers to the processing of any documents for disclosure, *e.g.,* doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(e) The term ''commercial use request'' is a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation.

(f) The term ''educational institution'' is any school that operates a program of teaching or scholarly research. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and in connection with the requester's role at a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of teaching or scholarly research. OMB may seek assurance from the requester that the request is in furtherance of teaching or scholarly research and will advise requesters of their placement in this category.

(g) The term ''non-commercial scientific institution'' refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (e) of this section) and that is operated solely for the purpose of conducting scientific research where the results of the research are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(h) The term ''representative of the news media'' refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

(i) The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, OMB can also consider a requester's past publication record in making this determination. OMB will advise requesters of their placement in this category.

§ 1303.91 Fees to be charged—general.

OMB will charge fees that recoup the full allowable direct costs it incurs. Moreover, it will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (*see* definition in § 1303.30(b)), such as the NTIS, OMB will inform requesters of the steps necessary to obtain records from those sources.

(a) *Search.* Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. OMB will charge search fees for all other requesters, subject to the restrictions of paragraph (h) of this section.

(1) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: Professional—$10.00; and clerical/administrative—$4.75.

(2) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; *i.e.,* the review conducted by an agency to determine whether an exemption applies to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The direct costs for such a subsequent review are assessable. However, review costs will not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. Review fees will be charged at the same rates as those charged for a search under paragraph (a)(1) of this section.

(c) *Duplication of records.* The requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format. Where photocopies are supplied, OMB will provide one copy per request at a cost of five cents per page. For copies prepared by computer, such as tapes or printouts, OMB will charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, OMB will charge the actual direct costs of producing the document(s).

(d) *Other charges.* OMB will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies; or

(2) Sending records by special methods, such as express mail.

(e) *Remittances.* Remittances shall be in the form of either a personal check, a bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer at the address found in § 1303.10(b).

(f) *Receipts and refunds.* A receipt for fees paid will be provided upon request. Refund of fees paid for services actually rendered will not be made.

(g) *First 100 pages and two hours of search time.* With the exception of requesters seeking documents for a commercial use, OMB will provide the first 100 pages of duplication (or the cost equivalent for other media) and the first two hours of search time without charge.

(h) *Restrictions on assessing fees.* If OMB fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in § 1303.90(g)

through (i), may not charge duplication fees, except as described in the following circumstances:

(1) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and OMB provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit will be excused for an additional 10 days.

(2) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and more than 5,000 pages are necessary to respond to the request, OMB may charge search fees, or, in the case of requesters described in § 1303.90(g) through (i), may charge duplication fees, if OMB has provided timely written notice to the requester in accordance with the FOIA and OMB has discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(3) If a court determines that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(i) *No Fees under $25.* No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25. If OMB estimates that the charges are likely to exceed $25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel to meet the requester's needs at a lower cost.

§ 1303.92 Fees to be charged—categories of requesters.

There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The specific levels of fees for each of these categories are:

(a) *Commercial use requesters.* When OMB receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. OMB may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (*see* § 1303.93(b)).

(b) *Educational and non-commercial scientific institution requesters.* OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1303.90(g) or (h). OMB may seek evidence from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(c) *Requesters who are representatives of the news media.* OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1303.90(i) and (j) and not make the request for commercial use. A request for records supporting the news dissemination function of the requester is not a commercial use for this category.

(d) *All other requesters.* OMB will charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests for records about the requesters filed in OMB's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for reproduction.

§ 1303.93 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* OMB may begin assessing interest charges on an unpaid bill starting on the 31st day after OMB sends the bill. If OMB receives the fee within the thirty-day grace period, interest will not accrue on the paid portion of the bill, even if the payment is unprocessed. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(b) *Charges for unsuccessful search.* OMB may properly charge for time spent searching even if it does not locate any responsive records or if OMB determines that the records are entirely exempt from disclosure.

(c) *Aggregating requests.* When OMB reasonably believes that a requester, or a group of requestors acting in concert, is attempting to divide a single request into a series of requests for the purpose of avoiding fees, OMB may aggregate those requests and charge fees accordingly. OMB may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(d) *Advance payments.* (1) OMB will not require a requester to make an advance payment, *i.e.,* payment before work is commenced or continued on a request, unless OMB estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250 or the requester has previously failed to make payments due within 30 days of billing.

(2) In cases in which OMB requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of OMB's fee determination, the request will be closed.

(e) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365).* OMB will comply with applicable provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

§ 1303.94 Waiver or reduction of charges.

(a) *How to apply for a fee waiver.* Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) *Factors for approving fee waivers.* OMB will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the following factors are satisfied:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when both of the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. OMB will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OMB will consider the following criteria:

(i) OMB will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, OMB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. OMB ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (b)(1) and (2) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) *Timing of requests for fee waivers.* Requests for a waiver or reduction of fees should be made when the request is first submitted to OMB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

Mark R. Paoletta,

General Counsel and Chief FOIA Officer.

[FR Doc. 2019–10269 Filed 5–20–19; 8:45 am]

BILLING CODE 3110–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS–SC–18–0067; SC18–948–2 FR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulations for Area No. 2

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the size requirements currently prescribed under the federal marketing order for Irish potatoes grown in Colorado. This action revises the minimum size requirement for U.S. No. 2 or better grade round potatoes to align with the current size requirements for all other types of U.S. No. 2 or better grade potatoes. In addition, this rule revises the size requirements for smaller size profile U.S. Commercial grade or better potatoes.

DATES: Effective June 20, 2019.

FOR FURTHER INFORMATION CONTACT: Barry Broadbent, Senior Marketing Specialist, or Gary D. Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, Fax: (503) 326–7440, or Email: *Barry.Broadbent@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement No. 97 and Order No. 948, as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado. Part 948, (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Colorado Potato Administrative Committee, Area 2 (Committee) locally administers the Order and is comprised of potato producers and handlers operating within the area of production.

This rule is also issued pursuant to section 8e of the Act (7 U.S.C. 608e–1), which provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted

prior to any judicial challenge to the provisions of import regulations issued under section 8e of the Act.

This final rule revises the size requirements prescribed for potatoes regulated under the Order. This action modifies the minimum size requirement for U.S. No. 2 or better grade round potatoes from 2 inches minimum diameter to 2 inches minimum diameter or 4 ounces minimum weight. The change in the handling regulations is effectuated by merging the size requirements for U.S. No. 2 or better grade potatoes (previously differentiated with separate requirements for round varieties and all other varieties) into one minimum size requirement that covers all U.S. No. 2 or better grade potatoes.

In addition, this rule revises the size requirements for U.S. Commercial grade or better potatoes to allow handling of ¾-inch minimum to 1⅞-inch maximum diameter potatoes. The new size requirement is a change from the ¾-inch minimum to 1⅝-inch maximum diameter size range (''Creamer'' size as defined in the U.S. Standards for Grades of Potatoes (7 CFR 51.1545) (Standards)) allowed prior to implementation of this rule. The handling regulations will no longer refer to the ''Creamer'' size in the size requirements, because the specified size range will no longer conform to the Creamer requirements in the Standards. The changes to the handling regulations were unanimously recommended by the Committee at a meeting held on July 12, 2018.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the Order's production area. Section 948.21 authorizes the modification, suspension, or termination of regulations issued pursuant to § 948.22.

Under the Order, the State of Colorado is divided into three areas of regulation for marketing order purposes. These include: Area 1, commonly known as the Western Slope; Area 2, commonly known as San Luis Valley; and, Area 3, which consists of the remaining producing areas within the State of Colorado not included in the definitions of Area 1 or Area 2. Currently, the Order only regulates the handling of potatoes produced in Area 2 and Area 3. Regulation for Area 1 has been suspended.

The grade, size, and maturity requirements specific to the handling of potatoes grown in Area 2 are contained in § 948.386 of the Order. Prior to this action, the Order's handling regulations required round varieties of potatoes to be U.S. No. 2 or better grade, and 2 inches minimum diameter. All other non-round varieties of potatoes were required to be U.S. No. 2 or better grade, and either 2 inches minimum diameter or 4 ounces minimum weight. Additionally, potatoes that are U.S. Commercial grade or better were allowed to be Size B (1½-inch minimum to 2¼-inch maximum diameter) or Creamer size (¾-inch minimum to 1⅝-inch maximum diameter).

At the July 12, 2018, Committee meeting, industry participants, including the Colorado Department of Agriculture Inspection Division, indicated to the Committee that standardizing the size requirement for all varieties of U.S. No. 2 or better grade potatoes to 2 inches minimum diameter or 4 ounces minimum weight would simplify the handling of potatoes from the production area. The industry believes that merging the two current size requirements for U.S. No. 2 or better grade potatoes into one minimum size requirement covering all varieties of U.S. No. 2 or better potatoes will ease the implementation of the handling regulations for handlers and for the fresh produce inspectors. Further, industry stakeholders stated that there is a market for U.S. Commercial grade or better potatoes of a slightly larger size profile than currently allowed under the Creamer size, and increasing the maximum size in the profile to 1⅞-inch maximum diameter would facilitate sales.

Revising the size requirements for round U.S. No. 2 or better grade potatoes and U.S. Commercial grade or better potatoes will allow area handlers to better compete with other domestic potato producing regions. The changes will effectively increase the quantity of potatoes that can enter the fresh market from the production area and will allow handlers to supply potato buyers with the grade and size profiles that they prefer. This change is expected to benefit producers, handlers, and consumers of potatoes.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Import regulations issued, pursuant to the Act are based on the requirements established in Federal marketing orders.

There are approximately 60 handlers of Colorado Area No. 2 potatoes subject to the Order and approximately 160 producers in the regulated production area. In addition, there are approximately 255 importers of all types of potatoes, many of which import long types, who are also subject to the Order. Small agricultural service firms, which include potato handlers and importers, are defined by the Small Business Administration (SBA) as those having annual receipts of less than $7,500,000, and small agricultural producers are defined as those having annual receipts of less than $750,000 (13 CFR 121.201).

During the 2016–2017 marketing year, the most recent full marketing year for which statistics are available, approximately 19,828,000 hundredweight of Colorado Area No. 2 potatoes were inspected as required by the Order and sold into the fresh market. Based on information reported by USDA's Market News Service, the average f.o.b. shipping point price for the 2016–2017 Colorado potato crop was $11.79 per hundredweight. Multiplying $11.79 by the shipment quantity of 19,828,000 hundredweight yields an annual crop revenue estimate of $233,772,120. The average annual fresh potato revenue for each of the 60 handlers is therefore calculated to be $3,896,202 ($233,772,120 divided by 60), which is less than the SBA threshold of $7,500,000. Consequently, on average most of the Colorado Area No. 2 potato handlers may be classified as small entities.

In addition, based on information provided by the National Agricultural Statistics Service, the average producer price for the 2016 Colorado fall potato crop was $9.60 per hundredweight. Multiplying $9.60 by the shipment quantity of 19,828,000 hundredweight yields an annual crop revenue estimate of $190,348,800. The average annual fresh potato revenue for each of the 160 Colorado Area No. 2 potato producers is therefore calculated to be approximately $1,189,680 ($190,348,800 divided by 160), which is greater than the SBA threshold of $750,000. Therefore, on average, most of the Area No. 2 Colorado potato producers may not be classified as small entities.

Further, based on information from USDA's Foreign Agricultural Service (FAS), potato importers imported 17,254,160 hundredweight of potatoes into the U.S. in 2017. FAS also reported

the total value of potato imports for 2017 to be $235,685,000. The average 2017 annual revenue of the estimated 255 potato importers is therefore calculated to be $924,255 ($235,685,000 divided by 255), which is significantly less than the SBA threshold of $7,500,000. Consequently, on average, most of the entities importing potatoes into the U.S. may be classified as small entities.

This rule revises the minimum size requirement for round U.S. No. 2 grade or better potatoes from 2 inches minimum diameter to 2 inches minimum diameter or 4 ounces minimum weight. In addition, this final rule revises the size requirements for U.S. Commercial grade or better potatoes to allow handling of ¾-inch minimum to 1⅞-inch maximum diameter size range potatoes. Revising the size requirements will allow Colorado Area 2 handlers to market more of their potatoes and enable them to better compete with the other domestic potato producing regions. All other requirements in the Order's handling regulations remain unchanged. Authority for this action is contained in §§ 948.20, 948.21, and 948.22 of the Order.

This final rule is expected to benefit the producers, handlers, and consumers of Colorado Area 2 potatoes by allowing a greater quantity of potatoes from the production area to enter the fresh market. The anticipated increase in volume is expected to translate into greater returns for handlers and producers, and more purchasing options for consumers.

At its July 12, 2018, meeting, the Committee discussed possible alternatives to this action. The Committee determined that a change in the size requirements for U.S. No. 2 or better grade round potatoes, and U.S. Commercial grade or better potatoes, will meet the industry's current marketing needs while maintaining the integrity of the Order's quality objectives. During its deliberations, the Committee considered making no changes to the handling regulations, as well as further changing the size requirements for all potatoes. The Committee believed that a revision to the Order's size requirements is necessary to allow handlers to pursue all available markets, but further revising the size requirements for all other types and varieties of potatoes could erode the quality reputation of the area's production. Therefore, the Committee found that there were no other viable alternatives to this action.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes are necessary in those requirements as a result of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This rule revises the size requirements established under the Order. Accordingly, this action does not impose any additional reporting or recordkeeping requirements on either small or large potato handlers and importers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on January 31, 2019 (84 FR 572). Copies of the proposed rule were also mailed or sent via facsimile to all Colorado potato handlers. The proposal was made available through the internet by USDA and the Office of the Federal Register. A 60-day comment period ending April 1, 2019, was provided for interested persons to respond to the proposal. One comment was received during the comment period. The comment was supportive of the proposal. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

■ 1. The authority citation for part 948 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. In § 948.386, remove paragraph (a)(1), redesignate paragraphs (a)(2) through (5) as paragraphs (a)(1) through (4), and revise new paragraphs (a)(1) and (3).

The revisions read as follows:

§ 948.386 Handling regulation.

* * * * *

(a) * * *

(1) *All varieties.* U.S. No. 2 or better grade, 2 inches minimum diameter or 4 ounces minimum weight.

* * * * *

(3) *¾-inch minimum to 1⅞-inch maximum diameter.* U.S. Commercial grade or better.

* * * * *

Dated: May 16, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–10615 Filed 5–20–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2017–1012; Airspace Docket No. 17–ANM–20]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Olympia, WA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, technical amendment.

SUMMARY: This action corrects the header text for the Class D and Class E airspace areas for Olympia, WA. The state abbreviation for the location of the airport in the header is corrected from OR to WA. This does not affect the charted boundaries or operating requirements of the airspace.

DATES: Effective 0901 UTC, August 15, 2019. The Director of the Federal

Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11C, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Bonnie Malgarini, Federal Aviation Administration, Operations Support Group, Western Service Center, 2200 S 216th Street, Des Moines, WA 98198–6547; telephone (206) 231–2329.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it corrects the state abbreviation for Olympia, WA.

History

The FAA noticed the state abbreviation used in the title for Olympia, WA, was in error. It identified OR as the location's state instead of WA. This action corrects that error.

Class D and E airspace designations are published in paragraph 5000, 6002, 6004, and 6005, respectively, of FAA Order 7400.11C, dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace state abbreviation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11C dated August 13, 2018, and effective September 15, 2018, which is incorporated by reference in 14 CFR part 71.1. FAA Order 7400.11C is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11C lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

The FAA is amending Title 14, Code of Federal Regulations (14 CFR) part 71 by correcting the state identifier in the title of the Class D and Class E airspace description from OR to WA for Olympia, WA.

This is an administrative change and does not affect the boundaries, altitudes, or operating requirements of the airspace, therefore, notice and public procedure under 5 U.S.C. 553(b) is unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11C, Airspace Designations and Reporting Points, dated August 13, 2018, and effective September 15, 2018, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ANM WA D Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 4-mile radius of Olympia Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

ANM WA E2 Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace within a 4-mile radius of Olympia Regional Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6004 Class E Airspace Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

ANM WA E4 Olympia, WA [Amended]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from the surface within the area bounded by a line beginning at lat. 46°57′14″ N, long.

122°48′28″ W; to lat. 46°56′44″ N, long. 122°47′08″ W; to lat. 46°55′28″ N, long. 122°47′10″ W; to lat. 46°54′42″ N, long. 122°47′45″ W; to lat. 46°55′28″ N, long. 122°49′51″ W; thence counter-clockwise along the 4-mile radius of the airport to the point of beginning.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ANM WA E5 Olympia, WA [New]

Olympia Regional Airport, WA
(Lat. 46°58′10″ N, long. 122°54′09″ W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Olympia Regional Airport from the airport 211° bearing clockwise to the airport 088° bearing, and within an 8.2-mile radius of the airport from the airport 088° bearing clockwise to the airport 122° bearing, and within a 12.4-mile radius of the airport from the airport 122° bearing clockwise to the airport 211° bearing, and within 1 mile each side of the 011° bearing from the airport extending to 11.6 miles north of the airport.

Issued in Seattle, Washington, on May 8, 2019.

Shawn M. Kozica,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2019–10554 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 190513445–9445–01]

RIN 0694–AH86

Addition of Entities to the Entity List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding Huawei Technologies Co., Ltd. (Huawei) to the Entity List. The U.S. Government has determined that there is reasonable cause to believe that Huawei has been involved in activities contrary to the national security or foreign policy interests of the United States. BIS is also adding non-U.S. affiliates of Huawei to the Entity List because those affiliates pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States. Huawei will be listed on the Entity List under the destination of China. This final rule also adds to the Entity List sixty-eight non-U.S. affiliates of Huawei located in twenty-six destinations: Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Egypt, Germany, Hong Kong, Jamaica, Japan, Jordan, Lebanon, Madagascar, Netherlands, Oman, Pakistan, Paraguay, Qatar, Singapore, Sri Lanka, Switzerland, Taiwan, United Kingdom, and Vietnam.

DATES: *Effective Date:* This rule is effective May 16, 2019.

FOR FURTHER INFORMATION CONTACT: Director, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, Phone: (949) 660–0144 or (408) 998–8806 or email your inquiry to: *ECDOEXS@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to part 744) identifies entities reasonably believed to be involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States. The Export Administration Regulations (EAR) (15 CFR, subchapter C, parts 730–774) imposes additional license requirements on, and limits the availability of most license exceptions for exports, reexports, and transfers (in-country) to, listed entities. The license review policy for each listed entity is identified in the ''License review policy'' column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** notice adding entities to the Entity List. BIS places entities on the Entity List pursuant to part 744 (Control Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote.

ERC Entity List Decision

Additions to the Entity List

Under § 744.11(b) (Criteria for revising the Entity List) of the EAR, persons for whom there is reasonable cause to believe, based on specific and articulable facts, that the person has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such persons may be added to the Entity List.

Pursuant to § 744.11(b) of the EAR, the ERC has determined that there is reasonable cause to believe that Huawei Technologies Co., Ltd. (Huawei) has been involved in activities determined to be contrary to the national security or foreign policy interests of the United States. To illustrate, Huawei has been indicted in the U.S. District Court for the Eastern District of New York on 13 counts of violating U.S. law (Superseding Indictment), including violations of the International Emergency Economic Powers Act (IEEPA), by knowingly and willfully causing the export, reexport, sale and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran and the government of Iran without obtaining a license from the Department of Treasury's Office of Foreign Assets Control (OFAC), as required by OFAC's Iranian Transactions and Sanctions Regulations (31 CFR part 560), and conspiracy to violate IEEPA by knowingly and willfully conspiring to cause the export, reexport, sale and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran and the government of Iran without obtaining a license from OFAC as required by OFAC's Iranian Transactions and Sanctions Regulations (31 CFR part 560). The Superseding Indictment also alleges that Huawei and an Iranian-based affiliate, working with others, knowingly and willfully conspired to impair, impede, obstruct, and defeat, through deceitful and dishonest means, the lawful government operations of OFAC.

Further, Huawei's affiliates present a significant risk of acting on Huawei's behalf to engage in such activities. Because the ERC has determined that there is reasonable cause to believe that the affiliates pose a significant risk of becoming involved in activities contrary to the national security or foreign policy interests of the United States due to their relationship with Huawei, this final rule also adds to the Entity List sixty-eight non-U.S. affiliates of Huawei located in twenty-six destinations: Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Egypt, Germany, Hong Kong, Jamaica, Japan, Jordan, Lebanon, Madagascar, Netherlands, Oman, Pakistan, Paraguay, Qatar, Singapore, Sri Lanka, Switzerland,

Taiwan, United Kingdom, and Vietnam. Without the imposition of a license requirement as to these affiliated companies, there is reasonable cause to believe that Huawei would seek to use these entities to evade the restrictions imposed by its addition to the Entity List. As set forth in the Superseding Indictment filed in the Eastern District of New York, Huawei participated along with certain affiliates in the alleged criminal violations of U.S. law, including one or more non-U.S. affiliates. The Superseding Indictment also alleges that Huawei and affiliates acting on Huawei's behalf engaged in a series of deceptive and obstructive acts designed to evade U.S. law and to avoid detection by U.S. law enforcement.

In light of the foregoing, Huawei and sixty-eight non-U.S. affiliates of Huawei raise sufficient concern that prior review of exports, reexports, or transfers (in-country) of items subject to the EAR involving these entities, and the possible imposition of license conditions or license denials on shipments to these entities, will enhance BIS's ability to prevent activities contrary to the national security or foreign policy interests of the United States.

For all of the entities added to the Entity List in this final rule, unless authorized by the *Savings Clause* in this final rule, BIS imposes a license requirement for all items subject to the EAR and a license review policy of presumption of denial. Similarly, no license exceptions are available for exports, reexports, or transfers (in-country) to the persons being added to the Entity List in this rule except as allowed in the *Savings Clause* in this final rule.

This final rule adds the following entity to the Entity List:

China

(1) *Huawei Technologies Co., Ltd. (Huawei),* Bantian Huawei Base, Longgang District, Shenzhen, 518129, China.

This final rule also adds the following sixty-eight non-U.S. affiliates of the entry above to the Entity List:

Belgium

(1) *Huawei Technologies Research & Development Belgium NV,* Belgium.

Bolivia

(1) *Huawei Technologies (Bolivia) S.R.L.,* La Paz, Bolivia.

Brazil

(1) *Huawei do Brasil Telecomunicacões Ltda,* Sao Paulo, Brazil.

Burma

(1) *Huawei Technologies (Yangon) Co., Ltd.,* Yangon, Burma.

Canada

(1) *Huawei Technologies Canada Co., Ltd.,* Markham, ON, Canada.

Chile

(1) *Huawei Chile S.A.,* Santiago, Chile.

China

(1) *Beijing Huawei Digital Technologies Co., Ltd.,* Beijing, China;
(2) *Chengdu Huawei High-Tech Investment Co., Ltd.,* Chengdu, Sichuan, China;
(3) *Chengdu Huawei Technologies Co., Ltd.,* Chengdu, Sichuan, China;
(4) *Dongguan Huawei Service Co., Ltd.,* Dongguan, Guangdong, China;
(5) *Dongguan Lvyuan Industry Investment Co., Ltd.,* Dongguan, Guangdong, China;
(6) *Gui'an New District Huawei Investment Co., Ltd.,* Guiyang, Guizhou, China;
(7) *Hangzhou Huawei Digital Technology Co., Ltd.,* Hangzhou, Zhejiang, China;
(8) *HiSilicon Optoelectronics Co., Ltd.,* Wuhan, Hubei, China;
(9) *HiSilicon Technologies Co., Ltd (HiSilicon),* Bantian Longgang District, Shenzhen, 518129, China.
(10) *HiSilicon Tech (Suzhou) Co., Ltd.,* Suzhou, Jiangsu, China;
(11) *Huawei Device Co., Ltd.,* Dongguan, Guangdong, China;
(12) *Huawei Device (Dongguan) Co., Ltd.,* Dongguan, Guangdong, China;
(13) *Huawei Device (Shenzhen) Co., Ltd.,* Shenzhen, Guangdong, China;
(14) *Huawei Digital Technologies (Suzhou) Co., Ltd.,* Suzhou, Jiangsu, China;
(15) *Huawei Machine Co., Ltd.,* Dongguan, Guangdong, China;
(16) *Huawei Software Technologies Co., Ltd.,* Nanjing, Jiangsu, China;
(17) *Huawei Technical Service Co., Ltd.,* China;
(18) *Huawei Technologies Service Co., Ltd.,* Langfang, Hebei, China;
(19) *Huawei Training (Dongguan) Co., Ltd.,* Dongguan, Guangdong, China;
(20) *Huayi Internet Information Service Co., Ltd.,* Shenzhen, Guangdong, China;
(21) *North Huawei Communication Technology Co., Ltd.,* Beijing, China;
(22) *Shanghai Haisi Technology Co., Ltd.,* Shanghai, China;
(23) *Shanghai Huawei Technologies Co. Ltd.,* Shanghai, China;
(24) *Shanghai Mossel Trade Co., Ltd.,* Shanghai, China;
(25) *Shenzhen Huawei Technical Services Co., Ltd.,* Shenzhen, Guangdong, China;
(26) *Shenzhen Huawei Terminal Commercial Co., Ltd.,* Shenzhen, Guangdong, China;
(27) *Shenzhen Huawei Training School Co., Ltd.,* Shenzhen, Guangdong, China;
(28) *Shenzhen Huayi Loan Small Loan Co., Ltd.,* Shenzhen, Guangdong, China;
(29) *Shenzhen Legrit Technology Co., Ltd.,* Shenzhen, Guangdong, China;
(30) *Shenzhen Smartcom Business Co., Ltd.,* Shenzhen, Guangdong, China;
(31) *Suzhou Huawei Investment Co., Ltd.,* Suzhou, Jiangsu, China;
(32) *Wuhan Huawei Investment Co., Ltd.,* Wuhan, Hubei, China;
(33) *Xi'an Huawei Technologies Co., Ltd.,* Xi'an, Shaanxi, China;
(34) *Xi'an Ruixin Investment Co., Ltd.,* Xi'an, Shaanxi, China; *and*
(35) *Zhejiang Huawei Communications Technology Co., Ltd.,* Hangzhou, Zhejiang, China.

Egypt

(1) *Huawei Technology,* Cairo, Egypt.

Germany

(1) *Huawei Technologies Deutschland GmbH,* Germany.

Hong Kong

(1) *Huawei Device (Hong Kong) Co., Limited,* Tsim Sha Tsui, Kowloon, Hong Kong;
(2) *Huawei International Co., Limited,* Hong Kong;
(3) *Huawei Tech. Investment Co., Limited,* Hong Kong;
(4) *Huawei Technologies Co. Ltd.,* Tsim Sha Tsui, Kowloon, Hong Kong;
(5) *Hua Ying Management Co. Limited,* Tsim Sha Tsui, Kowloon, Hong Kong; *and*
(6) *Smartcom (Hong Kong) Co., Limited,* Sheung Wan, Hong Kong;

Jamaica

(1) *Huawei Technologies Jamaica Company Limited,* Kingston, Jamaica.

Japan

(1) *Huawei Technologies Japan K.K.,* Japan.

Jordan

(1) *Huawei Technologies Investment Co. Ltd.,* Amman, Jordan.

Lebanon

(1) *Huawei Technologies Lebanon,* Beirut, Lebanon.

Madagascar

(1) *Huawei Technologies Madagascar Sarl,* Antananarivo, Madagascar.

Netherlands

(1) *Huawei Technologies Coöperatief U.A.,* Netherlands.

Oman

(1) *Huawei Tech Investment Oman LLC,* Muscat, Oman.

Pakistan

(1) *Huawei Technologies Pakistan (Private) Limited,* Islamabad, Pakistan.

Paraguay

(1) *Huawei Technologies Paraguay S.A.,* Asuncion, Paraguay.

Qatar

(1) *Huawei Tech Investment Limited,* Doha, Qatar.

Singapore

(1) *Huawei International Pte. Ltd.,* Singapore.

Sri Lanka

(1) *Huawei Technologies Lanka Company (Private) Limited,* Colombo, Sri Lanka.

Switzerland

(1) *Huawei Technologies Switzerland AG,* Liebefeld, Bern, Switzerland.

Taiwan

(1) *Xunwei Technologies Co., Ltd.,* Taipei, Taiwan.

United Kingdom

(1) *Huawei Global Finance (UK) Limited,* Great Britain;

(2) *Proven Glory,* British Virgin Islands; *and*

(3) *Proven Honour,* British Virgin Islands.

Vietnam

(1) *Huawei Technologies (Vietnam) Company Limited,* Hanoi, Vietnam; *and*

(2) *Huawei Technology Co. Ltd.,* Hanoi, Vietnam.

Savings Clause

Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export or reexport, on May 16, 2019, pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR).

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (Title XVII, Subtitle B of Pub. L. 115–232 (132 Stat. 2210); 50 U.S.C. 4801 *et seq.*), which provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. As set forth in sec. 1768 of ECRA, all delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action that have been made, issued, conducted, or allowed to become effective under the Export Administration Act of 1979 (50 U.S.C. 4601 *et seq.*) (as in effect prior to August 13, 2018 and as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) and Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 8, 2018, 83 FR 39871 (August 13, 2018)), or the Export Administration Regulations, and are in effect as of August 13, 2018, shall continue in effect according to their terms until modified, superseded, set aside, or revoked under the authority of ECRA.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 42.5 minutes for a manual or electronic submission. Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to increase as a result of this rule. You may send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–7285.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to sec. 1762 of ECRA, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: Pub. L. 115–232, Title XVII, Subtitle B (132 Stat. 2210); 50 U.S.C. 4801 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of August 8, 2018, 83 FR 39871 (August 13, 2018); Notice of September 19, 2018, 83 FR 47799 (September 20, 2018). Notice of November 8, 2018, 83 FR 56253 (November 9, 2018); Notice of January 16, 2019, 84 FR 127 (January 18, 2019).

■ 2. Supplement No. 4 to part 744 is amended:

■ a. By adding in alphabetical order a heading for Belgium and one Belgian

entity, ''Huawei Technologies Research & Development Belgium NV''.

■ b. By adding in alphabetical order a heading for Bolivia and one Bolivian entity, ''Huawei Technologies (Bolivia) S.R.L.''.

■ c. By adding in alphabetical order a heading for Brazil and one Brazilian entity, ''Huawei do Brasil Telecomunicacões Ltda''.

■ d. By adding in alphabetical order a heading for Burma and one Burmese entity, ''Huawei Technologies (Yangon) Co., Ltd.''.

■ e. Under Canada, by adding in alphabetical order, one Canadian entity, ''Huawei Technologies Canada Co., Ltd''.

■ f. By adding in alphabetical order a heading for Chile and one Chilean entity, ''Huawei Chile S.A.''.

■ g. Under China, People's Republic of, by adding in alphabetical order, thirty-six Chinese entities: ''Beijing Huawei Digital Technologies Co., Ltd.'', ''Chengdu Huawei High-Tech Investment Co., Ltd.'', ''Chengdu Huawei Technologies Co., Ltd.'', ''Dongguan Huawei Service Co., Ltd.'', ''Dongguan Lvyuan Industry Investment Co., Ltd.'', ''Gui'an New District Huawei Investment Co., Ltd.'', ''Hangzhou Huawei Digital Technology Co., Ltd.'', ''HiSilicon Optoelectronics Co., Ltd.'', ''HiSilicon Technologies Co., Ltd (HiSilicon)'', ''HiSilicon Tech (Suzhou) Co., Ltd.'', ''Huawei Device Co., Ltd.'', ''Huawei Device (Dongguan) Co., Ltd.'', ''Huawei Device (Shenzhen) Co., Ltd.'', ''Huawei Digital Technologies (Suzhou) Co., Ltd.'', ''Huawei Machine Co., Ltd.'', ''Huawei Software Technologies Co., Ltd.'', ''Huawei Technical Service Co., Ltd.'', ''Huawei Technologies Co., Ltd.'', ''Huawei Technologies Service Co., Ltd.'', ''Huawei Training (Dongguan) Co., Ltd.'', ''Huayi internet Information Service Co., Ltd.'', ''North Huawei Communication Technology Co., Ltd.'', ''Shanghai Haisi Technology Co., Ltd.'', ''Shanghai Huawei Technologies Co. Ltd.'', ''Shanghai Mossel Trade Co., Ltd.'', ''Shenzhen Huawei Technical Services Co., Ltd.'', ''Shenzhen Huawei Terminal Commercial Co., Ltd.'', ''Shenzhen Huawei Training School Co., Ltd.'', ''Shenzhen Huayi Loan Small Loan Co., Ltd.'', ''Shenzhen Legrit Technology Co., Ltd.'', ''Shenzhen Smartcom Business Co., Ltd.'', ''Suzhou Huawei Investment Co., Ltd.'', ''Wuhan Huawei Investment Co., Ltd.'', ''Xi'an Huawei Technologies Co., Ltd.'', ''Xi'an Ruixin Investment Co., Ltd.'', and ''Zhejiang Huawei Communications Technology Co., Ltd.''.

■ h. Under Egypt, by adding in alphabetical order, one Egyptian entity, ''Huawei Technology''.

■ i. Under Germany, by adding in alphabetical order, one German entity, ''Huawei Technologies Deutschland GmbH''.

■ j. Under Hong Kong, by adding in alphabetical order, six Hong Kong entities, ''Huawei Device (Hong Kong) Co., Limited'', ''Huawei International Co., Limited'', ''Huawei Tech. Investment Co., Limited'', ''Huawei Technologies Co. Ltd.'', ''Hua Ying Management Co. Limited'', and ''Smartcom (Hong Kong) Co., Limited''.

■ k. By adding in alphabetical order a heading for Jamaica and one Jamaican entity, ''Huawei Technologies Jamaica Company Limited''.

■ l. By adding in alphabetical order a heading for Japan and one Japanese entity, ''Huawei Technologies Japan K.K.''.

■ m. By adding in alphabetical order a heading for Jordan and one Jordanian entity, ''Huawei Technologies Investment Co. Ltd.''.

■ n. By adding in alphabetical order, under Lebanon, one Lebanese entity, ''Huawei Technologies Lebanon''.

■ o. By adding in alphabetical order a heading for Madagascar and one Malagasy entity, ''Huawei Technologies Madagascar Sarl''.

■ p. Under Netherlands, by adding in alphabetical order, one Dutch entity, ''Huawei Technologies Coöperatief U.A.''.

■ q. By adding in alphabetical order a heading for Oman and one Omani entity, ''Huawei Tech Investment Oman LLC''.

■ r. Under Pakistan, by adding in alphabetical order, one Pakistani entity, ''Huawei Technologies Pakistan (Private) Limited''.

■ s. By adding in alphabetical order a heading for Paraguay and one Paraguayan entity, ''Huawei Technologies Paraguay S.A.''.

■ t. By adding in alphabetical order a heading for Qatar and one Qatari entity, ''Huawei Tech Investment Limited''.

■ u. Under Singapore, by adding in alphabetical order, one Singaporean entity, ''Huawei International Pte. Ltd.''.

■ v. By adding in alphabetical order a heading for Sri Lanka and one Sinhalese entity, ''Huawei Technologies Lanka Company (Private) Limited''.

■ w. Under Switzerland, by adding in alphabetical order, one Swiss entity, ''Huawei Technologies Switzerland AG''.

■ x. Under Taiwan, by adding in alphabetical order, one Taiwanese entity, ''Xunwei Technologies Co., Ltd.''

■ y. Under United Kingdom, by adding in alphabetical order, three British entities, ''Huawei Global Finance (UK) Limited'', ''Proven Glory'', and ''Proven Honour''.

■ z. By adding in alphabetical order a heading for Vietnam and two Vietnamese entities, ''Huawei Technologies (Vietnam) Company Limited'' and ''Huawei Technology Co. Ltd.''.

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	*
BELGIUM	Huawei Technologies Research & Development Belgium NV, Belgium.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	*	*	*	*
BOLIVIA	Huawei Technologies (Bolivia) S.R.L., La Paz, Bolivia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
BRAZIL	Huawei do Brasil Telecomunicacões Ltda, Sao Paulo, Brazil.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.

Country	Entity	License requirement	License review policy	Federal Register citation
*	* *	*	* *	*
BURMA	Huawei Technologies (Yangon) Co., Ltd., Yangon, Burma.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
CANADA	* *	* *	*	*
	Huawei Technologies Canada Co., Ltd., Markham, ON, Canada.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
CHILE	Huawei Chile S.A., Santiago, Chile.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
CHINA, PEOPLE'S REPUBLIC OF.	* *	* *	*	*
	Beijing Huawei Digital Technologies Co., Ltd., Beijing, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Chengdu Huawei High-Tech Investment Co., Ltd., Chengdu, Sichuan, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Chengdu Huawei Technologies Co., Ltd., Chengdu, Sichuan, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Dongguan Huawei Service Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Dongguan Lvyuan Industry Investment Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Gui'an New District Huawei Investment Co., Ltd., Guiyang, Guizhou, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Hangzhou Huawei Digital Technology Co., Ltd., Hangzhou, Zhejiang, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	HiSilicon Optoelectronics Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	HiSilicon Technologies Co., Ltd (HiSilicon), Bantian Longgang District, Shenzhen, 518129, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	HiSilicon Tech (Suzhou) Co., Ltd., Suzhou, Jiangsu, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Device Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Device (Dongguan) Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Device (Shenzhen) Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Digital Technologies (Suzhou) Co., Ltd., Suzhou, Jiangsu, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Machine Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Software Technologies Co., Ltd., Nanjing, Jiangsu, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Technologies Co., Ltd., Bantian Huawei Base, Longgang District, Shenzhen, 518129, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Technical Service Co., Ltd., China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Technologies Service Co., Ltd., Langfang, Hebei, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Training (Dongguan) Co., Ltd., Dongguan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huayi Internet Information Service Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	* *	* *	*	*
	North Huawei Communication Technology Co., Ltd., Beijing, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Shanghai Haisi Technology Co., Ltd., Shanghai, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shanghai Huawei Technologies Co. Ltd., Shanghai, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Shanghai Mossel Trade Co., Ltd., Shanghai, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Shenzhen Huawei Technical Services Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shenzhen Huawei Terminal Commercial Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shenzhen Huawei Training School Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shenzhen Huayi Loan Small Loan Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shenzhen Legrit Technology Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Shenzhen Smartcom Business Co., Ltd., Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Suzhou Huawei Investment Co., Ltd., Suzhou, Jiangsu, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Wuhan Huawei Investment Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Xi'an Huawei Technologies Co., Ltd., Xi'an, Shaanxi, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Xi'an Ruixin Investment Co., Ltd., Xi'an, Shaanxi, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Zhejiang Huawei Communications Technology Co., Ltd., Hangzhou, Zhejiang, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
*	* * *	* *	* *	*
EGYPT	* *	* *	*	*
	Huawei Technology, Cairo, Egypt.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	* * *	* *	* *	*
GERMANY	* *	* *	*	*
	Huawei Technologies Deutschland GmbH, Germany.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
*	* * *	* *	* *	*
HONG KONG	* *	* *	*	*
	Huawei Device (Hong Kong) Co., Limited, Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei International Co., Limited, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.

Country	Entity	License requirement	License review policy	Federal Register citation
	Huawei Tech. Investment Co., Limited, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Technologies Co. Ltd., Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Hua Ying Management Co. Limited, Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
	Smartcom (Hong Kong) Co., Limited, Sheung Wan, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
*	* *	* *	*	*
JAMAICA	Huawei Technologies Jamaica Company Limited, Kingston, Jamaica.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
JAPAN	Huawei Technologies Japan K.K., Japan.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
JORDAN	Huawei Technologies Investment Co. Ltd., Amman, Jordan.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	* *	* *	*	*
LEBANON	* *	* *	*	*
	Huawei Technologies Lebanon, Beirut, Lebanon.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
MADAGASCAR	Huawei Technologies Madagascar Sarl, Antananarivo, Madagascar.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	* *	* *	*	*
NETHERLANDS	* *	* *	*	*
	Huawei Technologies Coöperatief U.A., Netherlands.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
*	* *	* *	*	*
OMAN	Huawei Tech Investment Oman LLC, Muscat, Oman.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
PAKISTAN	* *	* *	*	*
	Huawei Technologies Pakistan (Private) Limited, Islamabad, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*
*	* *	* *	*	*
PARAGUAY	Huawei Technologies Paraguay S.A., Asuncion, Paraguay.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	* *	* *	*	*
QATAR	Huawei Tech Investment Limited, Doha, Qatar.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	* *	* *	*	*
SINGAPORE	* *	* *	*	*
	Huawei International Pte. Ltd., Singapore.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	* *	* *	*	*

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	*	*	*	*
SRI LANKA	Huawei Technologies Lanka Company (Private) Limited, Colombo, Sri Lanka.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
*	*	*	*	*
SWITZERLAND	*	*	*	*
	Huawei Technologies Switzerland AG, Liebefeld, Bern, Switzerland.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	*	*	*	*
*	*	*	*	*
TAIWAN	*	*	*	*
	Xunwei Technologies Co., Ltd., Taipei, Taiwan.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	*	*	*	*
*	*	*	*	*
UNITED KINGDOM	*	*	*	*
	Huawei Global Finance (UK) Limited, Great Britain.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	*	*	*	*
	Proven Glory, British Virgin Islands	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Proven Honour, British Virgin Islands.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	*	*	*	*
VIETNAM	Huawei Technologies (Vietnam) Company Limited, Hanoi, Vietnam.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.
	Huawei Technology Co. Ltd., Hanoi, Vietnam.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	84 FR [INSERT FR PAGE NUMBER] May 21, 2019.

Dated: May 16, 2019.

Wilbur Ross,

Secretary of Commerce.

[FR Doc. 2019–10616 Filed 5–16–19; 4:15 pm]

BILLING CODE 3510–33–P

DEPARTMENT OF STATE

22 CFR Part 41

[Public Notice: 10726]

RIN 1400–AD93

Visa Information Update Requirements Under the Electronic Visa Update System (EVUS)

AGENCY: Department of State.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Department of State is confirming the effective date of November 29, 2016, for the final rule that published in the **Federal Register** of October 26, 2016, instituting a requirement for nonimmigrant aliens who hold a passport issued by an identified country containing a U.S. nonimmigrant visa of a designated category to provide required information to DHS after the receipt of his or her visa of a designated category.

DATES: The effective date of final rule published in the **Federal Register** of October 20, 2016 (81 FR 72522), is confirmed: November 29, 2016.

FOR FURTHER INFORMATION CONTACT: Taylor Beaumont, Acting Division Chief, U.S. Department of State, Office of Legislation and Regulations, CA/VO/L/R, 600 19th Street NW, Washington, DC 20522, (202) 485–8910, *VisaRegs@state.gov.*

SUPPLEMENTARY INFORMATION: The Department published a final rule, Public Notice 9530 at 81 FR 72522, October 20, 2016, with a request for comments, amending sections of part 41 of title 22 of the Code of Federal Regulations. The rule provided modifications to the visa revocation regulations, which, with the the DHS rule amending 8 CFR part 215, subpart B (RIN 1651–AB08), created the Electronic Visa Update System (EVUS). As provided in 8 CFR part 215, subpart B, EVUS is an online information update system that requires nonimmigrant aliens who hold a passport issued by an identified country containing a U.S. nonimmigrant visa of a designated category to enroll in EVUS by providing information to DHS after the receipt their visa. The final rule became effective on November 29, 2016, and remains unchanged.

Analysis of Comments: The final rule was published with request for comments on October 20, 2016, Vol. 81, No. 203, Page 72522. The comment period closed on December 19, 2016. The Department received one non-responsive comment to the final rule. As the comment was non-responsive, it does not provide a basis to reconsider the rule.

List of Subjects in 22 CFR Part 41

Aliens, Foreign officials, Immigration, Passports and visas, Students.

Regulatory Findings

The Regulatory Findings included in the final rule are incorporated herein.

Executive Order 13771

This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because it is issued with respect to a foreign affairs function of the United States.

Accordingly, for the reasons stated in the preamble, the final rule published on October 20, 2016, remains unchanged, and the amendments issued in the final rule became effective on November 29, 2016. See 81 FR at 72523.

Carl C. Risch,

Assistant Secretary, Consular Affairs, U.S. Department of State.

[FR Doc. 2019–10528 Filed 5–20–19; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2019–0203]

RIN 1625–AA08

Special Local Regulation; Upper Potomac River, National Harbor, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations for certain waters of the Upper Potomac River. This action is necessary to provide for the safety of life on the navigable waters located at National Harbor, MD, during a swim event on the morning of June 23, 2019. This regulation prohibits persons and vessels from entering the regulated area unless authorized by the Captain of the Port Maryland-National Capital Region or the Coast Guard Patrol Commander.

DATES: This rule is effective from 7 a.m. to 11 a.m. on June 23, 2019.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2019–0203 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ron Houck, U.S. Coast Guard Sector Maryland-National Capital Region; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
PATCOM Coast Guard Patrol Commander
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

Enviro-Sports Productions, Inc. of Stinson Beach, CA, notified the Coast Guard that it will be conducting the Washington DC Sharkfest Swim between 7:30 a.m. and 10:30 a.m. on June 23, 2019, along a course that starts and finishes at the end of the commercial pier at National Harbor, MD. In response, on April 9, 2019, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled ''Special Local Regulation; Upper Potomac River, National Harbor, MD'' (84 FR 14061). There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this open water swim event. During the comment period that ended May 9, 2019, we received no comments.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port Maryland-National Capital Region (COTP) has determined that potential hazards associated with the power boat racing event will be a safety concern for anyone intending to operate in or near the event area. The purpose of this rule is to protect event participants, spectators, and transiting vessels on specified waters of the Upper Potomac River before, during, and after the scheduled event.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received no comments on our NPRM published April 9, 2019. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes a special local regulation to be enforced from 7 a.m. through 11 a.m. on June 23, 2019. There is no alternate date planned for this event. The regulated area will cover all navigable waters of the Upper Potomac River, within an area bounded by a line connecting the following points: From the shoreline at latitude 38°47′30.30″ N, longitude 077°01′26.70″ W, thence west to latitude 38°47′30.00″ N, longitude 077°01′37.30″ W, thence south to latitude 38°47′08.20″ N, longitude 077°01′37.30″ W, thence east to latitude 38°47′09.00″ N, longitude 077°01′09.20″ W, located at National Harbor, MD. The duration of the special local regulations and size of the regulated area are intended to ensure the safety of life on these navigable waters before, during, and after the open water swim, scheduled from 7:30 a.m. to 10:30 a.m. on June 23, 2019.

Except for participants and vessels already at berth, a person or vessel within the regulated area at the start of enforcement of this regulation must immediately depart the regulated area. A person or vessel that desires to transit, moor, or anchor within the regulated area must obtain authorization from the COTP Maryland-National Capital Region or PATCOM. A person or vessel seeking such permission can contact the COTP Maryland-National Capital Region at telephone number 410–576–2693 or on VHF–FM channel 16, or the PATCOM on VHF–FM channel 16 and channel 22A. A vessel within the regulated area must operate at a safe speed that minimizes wake. Official Patrols are any vessel assigned or approved by Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign. If permission is granted, the person or vessel must pass directly through the regulated area as instructed by PATCOM. Official Patrols enforcing this regulated area can be contacted on VHF–FM channel 16 and channel 22A. A person or vessel not registered with the event sponsor as a participant or assigned as official patrols would be considered a spectator. Official Patrols will direct spectator vessels while within the regulated area. A spectator vessel must not loiter within the navigable channel while within the regulated area. The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on size, time of day and duration of the regulated area, which will impact a small designated area of the Upper Potomac River for 4 hours. The Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM channel 16 about the status of the regulated area. Moreover, the rule would allow vessels to seek permission to enter the regulated area, and vessel traffic would be able to safely transit the regulated area once the PATCOM deems it safe to do so.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States. The temporary regulated area will be in effect for 4 hours. It is categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. Add § 100.501T05–0203 to read as follows:

§ 100.501T05–0203 Special Local Regulation; Upper Potomac River, National Harbor, MD.

(a) *Definitions.* As used in this section:

Captain of the Port (COTP) Maryland-National Capital Region means the Commander, U.S. Coast Guard Sector

Maryland-National Capital Region or any Coast Guard commissioned, warrant or petty officer who has been authorized by the COTP to act on his behalf.

Coast Guard Patrol Commander (PATCOM) means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Maryland-National Capital Region.

Official Patrol means any vessel assigned or approved by Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

Participant means a person or vessel registered with the event sponsor as participating in the Washington DC Sharkfest Swim or otherwise designated by the event sponsor as having a function tied to the event.

Spectator means a person or vessel not registered with the event sponsor as participants or assigned as official patrols.

(b) *Location.* The following location is a regulated area. All navigable waters of the Upper Potomac River, within an area bounded by a line connecting the following points: From the Rosilie Island shoreline at latitude 38°47′30.30″ N, longitude 077°01′26.70″ W, thence west to latitude 38°47′30.00″ N, longitude 077°01′37.30″ W, thence south to latitude 38°47′08.20″ N, longitude 077°01′37.30″ W, thence east to latitude 38°47′09.00″ N, longitude 077°01′09.20″ W, thence southeast along the pier to latitude 38°47′06.30″ N, longitude 077°01′02.50″ W, thence north along the shoreline and west along the southern extent of the Woodrow Wilson (I–95/I–495) Memorial Bridge and south and west along the shoreline to the point of origin, located at National Harbor, MD. All coordinates reference Datum NAD 1983.

(c) *Special local regulations.* (1) The COTP Maryland-National Capital Region or PATCOM may forbid and control the movement of all vessels and persons, including event participants, in the regulated area. When hailed or signaled by an official patrol, a vessel or person in the regulated area shall immediately comply with the directions given by the patrol. Failure to do so may result in the Coast Guard expelling the person or vessel from the area, issuing a citation for failure to comply, or both. The COTP Maryland-National Capital Region or PATCOM may terminate the event, or a participant's operations at any time the COTP Maryland-National Capital Region or PATCOM believes it necessary to do so for the protection of life or property.

(2) Except for participants and vessels already at berth, a person or vessel within the regulated area at the start of enforcement of this section must immediately depart the regulated area.

(3) A spectator must contact the PATCOM to request permission to either enter or pass through the regulated area. The PATCOM, and official patrol vessels enforcing this regulated area, can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz) and channel 22A (157.1 MHz). If permission is granted, the spectator must pass directly through the regulated area as instructed by PATCOM. A vessel within the regulated area must operate at safe speed that minimizes wake. A spectator vessel must not loiter within the navigable channel while within the regulated area.

(4) A person or vessel that desires to transit, moor, or anchor within the regulated area must obtain authorization from the COTP Maryland-National Capital Region or PATCOM. A person or vessel seeking such permission can contact the COTP Maryland-National Capital Region at telephone number 410–576–2693 or on Marine Band Radio, VHF–FM channel 16 (156.8 MHz) or the PATCOM on Marine Band Radio, VHF–FM channel 16 (156.8 MHz).

(5) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) *Enforcement officials.* The Coast Guard may be assisted with marine event patrol and enforcement of the regulated area by other Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 7 a.m. to 11 a.m. on June 23, 2019.

Dated: May 16, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2019–10584 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2019–0314]

Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Navy Pier Southeast Safety Zone within the Chicago Harbor during specified times from May 25, 2019 through January 1, 2020. This action is necessary and intended to protect safety of life and property on navigable waters prior to, during, and immediately after firework displays. During the enforcement periods listed below, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or a designated representative.

DATES: The regulation in 33 CFR 165.931 will be enforced at the times specified below in **SUPPLEMENTARY INFORMATION** from May 25, 2019 through January 1, 2020.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email LT John Ramos, Waterways Management Division, Marine Safety Unit Chicago, U.S. Coast Guard; telephone (630) 986–2155, email *D09-DG-MSUChicago-Waterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zone; Chicago Harbor, Navy Pier Southeast, Chicago, IL listed in 33 CFR 165.931, from 10:10 p.m. through 10:30 p.m. each Saturday from May 25, 2019 through August 31, 2019, and from 9:25 p.m. through 9:45 p.m. each Wednesday from May 29, 2019 through August 28, 2019. Additionally, this safety zone will be enforced from 9:20 p.m. through 10 p.m. on July 4, 2019, and from 11:45 p.m. on December 31, 2019 through 12:30 a.m. on January 1, 2020.

This safety zone encompasses all waters of Lake Michigan within Chicago Harbor bounded by coordinates beginning at 41°53′23.3″ N, 087°36′04.5″ W; then south to 41°53′11.8″ N, 087°36′04.1″ W; then west to 41°53′12.1″ N, 087°35′40.5″ W; then north to 41°53′23.6″ N, 087°35′40.07″ W; then east back to the point of origin (NAD 83). Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or a designated on-scene representative.

This notice of enforcement is issued under authority of 33 CFR 165.931 and 5 U.S.C. 552(a). In addition to this notification in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of the above-specified enforcement periods of this safety zone via Broadcast Notice to Mariners and Local Notice to

Mariners. The Captain of the Port, Lake Michigan or a designated on-scene representative may be contacted via Channel 16, VHF–FM or at (414) 747–7182.

Dated: May 15, 2019.

Thomas J. Stuhlreyer,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2019–10539 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2019–0339]

Safety Zone for Fireworks Display; Upper Potomac River, Washington Channel, DC

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for a fireworks display taking place over the Washington Channel, adjacent to The Wharf DC, Washington, DC on June 8, 2019, (with an alternate date on October 18, 2019). This action is necessary to ensure the safety of life on navigable waterways during the fireworks display. Our regulation for recurring fireworks displays at this location from January 12, 2019, through December 31, 2019 identifies the safety zones for these fireworks display events. During the enforcement period, persons and vessels are prohibited from entering the safety zone unless authorized by the Captain of the Port Maryland-National Capital Region or a designated representative.

DATES: The regulations in 33 CFR 165.T05–1011 will be enforced for the location specified in paragraph (a) of that section from 8 p.m. through 10:30 p.m. on June 8, 2019, and if necessary due to inclement weather, from 8 p.m. through 9:30 p.m. on October 18, 2019.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Mr. Ron Houck, U.S. Coast Guard Sector Maryland-National Capital Region, Waterways Management Division; telephone 410–576–2674, email *D05-DG-SectorMD-NCR-MarineEvents@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.T05–1011 (84 FR 4333, Feb. 15, 2019) for a fireworks display from 9 p.m. through 9:15 p.m. on June 8, 2019. If necessary due to inclement weather, the fireworks display event will be rescheduled and the safety zone will be enforced from 8 p.m. through 9:30 p.m. on October 18, 2019. This action is being taken to provide for the safety of life on navigable waterways during the fireworks display. Our regulation for this fireworks display, § 165.T05–1011, specifies the location of the regulated area for this temporary safety zone, which encompasses portions of the Washington Channel, adjacent to The Wharf DC, Washington, DC. During the enforcement period, as specified in § 165.T05–1011(c), persons and vessels may not enter the safety zones unless authorized by the Captain of the Port Sector Maryland-National Capital Region (COTP) or the COTP's designated representative. All vessels underway within the safety zone at the time it is activated are to depart the zone. The Coast Guard may be assisted by other federal, state, or local agencies in the enforcement of the safety zone.

This notice of enforcement is issued under authority of 33 CFR 165.T05–1011 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide notification of the enforcement period via Broadcast Notice to Mariners and may provide notice via the Local Notice to Mariners.

Dated: May 15, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2019–10527 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2019–0157; FRL–9993–69–Region 2]

Approval of Air Quality Implementation Plans; New York; Cross-State Air Pollution Rule; NO_X Ozone Season Group 2, NO_X Annual, and SO_2 Group 1 Trading Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve a revision to the New York State Implementation Plan (SIP) addressing requirements of the Cross-State Air Pollution Rule (CSAPR). Under the CSAPR, large electricity generating units in New York are subject to Federal Implementation Plans (FIPs) requiring the units to participate in CSAPR federal trading programs for ozone season emissions of nitrogen oxides (NO_X), annual emissions of NO_X, and annual emissions of sulfur dioxide (SO_2). This action approves into New York's SIP the State's regulations that replace the default allowance allocation provisions of the CSAPR federal trading programs for ozone season NO_X, annual NO_X, and annual SO_2 emissions. The approval is being issued as a direct final rule without a prior proposed rule because EPA views it as uncontroversial and does not anticipate adverse comment.

DATES: This direct final rule will be effective on *June 20, 2019,* without further notice, unless the EPA receives adverse comment by June 20, 2019. If EPA receives adverse comment, we will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R02–OAR–2019–0157, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Kenneth Fradkin, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3702, or by email at *fradkin.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What action is EPA taking today?

The EPA is taking direct final action to approve New York's November 30, 2018 SIP submittal concerning CSAPR [1] trading programs for ozone-season emissions of NO_X, annual emissions of NO_X, and annual emissions of SO_2. Large Electric Generating Units (EGUs) in New York are subject to CSAPR FIPs that require the units to participate in the federal CSAPR NO_X Ozone Season Group 2 Trading Program, the federal CSAPR NO_X Annual Trading Program, and the federal CSAPR SO_2 Group 1 Trading Program. CSAPR provides a process for the submission and approval of SIP revisions to replace certain provisions of the CSAPR FIPs while the remaining FIP provisions continue to apply. This type of CSAPR SIP is termed an abbreviated SIP.

The New York State Department of Environmental Conservation (DEC) amended portions of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) to incorporate CSAPR requirements into the State's rules and allow the DEC to allocate CSAPR allowances to regulated entities in New York. 6 NYCRR Part 243, ''Transport Rule NO_X Ozone Season Trading Program,'' has been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 243, ''CSAPR NO_X Ozone Season Group 2 Trading Program.'' 6 NYCRR Part 244, ''Transport Rule NO_X Annual Trading Program,'' has been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 244, ''CSAPR NO_X Annual Trading Program.'' 6 NYCRR Part 245, ''Transport Rule SO_2 Group 1 Trading Program,'' has also been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 245, ''CSAPR SO_2 Group 1 Trading Program.'' Attendant revisions were made to 6 NYCRR Part 200, ''General Provisions,'' to update the list of referenced materials at Subpart 200.9 that are cited in the amended New York regulations. The EPA is taking direct final action to approve into the New York SIP the revised versions of 6 NYCRR Parts 200 (Subpart 200.9), 243, 244, and 245 included in the November 30, 2018 submission.

The EPA is also taking direct final action to repeal from the SIP previous versions of 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 which implemented New York's discontinued CAIR program. New York adopted amendments to 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 that repealed and replaced CAIR trading program rules with CSAPR trading rules on November 10, 2015. Subsequently, on November 11, 2018, New York adopted amendments to 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 that repealed and replaced the November 15, 2015 adopted rules that implemented New York's CSAPR program with new versions of New York's CSAPR trading program rules. The rules being repealed from the SIP are 6 NYCRR Part 243, ''CAIR NO_X Ozone Season Trading Program,''; 6 NYCRR Part 244, ''CAIR NO_X Annual Trading Program,''; and 6 NYCRR Part 245, ''CAIR SO_2 Trading Program.''

The EPA is also taking direct final action to approve into the SIP a revised version of 6 NYCRR Part 200 (Subpart 200.1) that was submitted to the EPA on July 23, 2015 to address updated definitions at Part 200.1(f) that were associated with a repeal of 6 NYCRR Part 203, ''Indirect Sources of Air Contamination.''

The revised versions of 6 NYCRR Parts 200 (Subpart 200.9), 243, 244, and 245 included in the November 30, 2018 SIP submission replace the previous versions of those rules that were included in a December 1, 2015 SIP submission. The EPA identified deficiencies in the December 1, 2015 submission but on November 20, 2017 conditionally approved those previous versions of Parts 200, 244, and 245 (but not Part 243) into the SIP (82 FR 57362, December 5, 2017). In a July 6, 2017 letter to the EPA, New York committed to submitting a SIP revision that addressed the identified deficiencies by December 29, 2017. However, New York's response to the conditional approval was not submitted to the EPA by December 29, 2017. The November 30, 2018 SIP submittal addresses the identified deficiencies, but was submitted approximately 11 months late, so the conditional approval is treated as a disapproval.[2]

The EPA did not take action on the previous version of 6 NYCRR Part 243, ''Transport Rule NO_X Ozone Season Trading Program,'' included in New York's December 1, 2015 submission. Following that submission, the EPA finalized the CSAPR Update rule[3] to address Eastern states' interstate air pollution mitigation obligations with regard to the 2008 Ozone National Ambient Air Quality Standard (NAAQS). Among other things, starting in 2017, the CSAPR Update rule required New York EGUs to participate in the new CSAPR NO_X Ozone Season Group 2 Trading Program instead of the earlier CSAPR NO_X Ozone Season Trading Program (now renamed the ''Group 1'' program) and replaced the ozone season budget for New York with a lower budget developed to address the revised and more stringent 2008 Ozone NAAQS. In a July 14, 2016 letter to the EPA, New York indicated that the State would revise 6 NYCRR Part 243 to conform with the final CSAPR Update. As indicated earlier in this section New York repealed 6 NYCRR Part 243 and replaced the rule in its entirety with a new rule, 6 NYCRR Part 243, ''CSAPR NO_X Ozone Season Group 2 Trading Program''.

This direct final action approves into New York's SIP state-determined allowance allocation procedures for ozone-season NO_X allowances that would replace EPA's default allocation procedures for the control periods in 2021 and beyond. Additionally, EPA is taking direct final action to approve into New York's SIP state-determined allowance allocation procedures for annual NO_X and SO_2 allowances that would replace EPA's default allocation procedures for the control periods in 2023 and beyond. The approval of this SIP revision does not alter any provision of either the CSAPR NO_X Ozone Season Group 2 Trading Program, the CSAPR NO_X Annual Trading Program, or the CSAPR SO_2 Group 1 Trading Program as applied to New York units other than the allowance allocation provisions. The FIP provisions requiring those units to participate in the programs (as modified by this SIP revision) remain in place.

Section II of this document summarizes relevant aspects of the CSAPR federal trading programs and FIPs as well as the range of opportunities states have to submit SIP revisions to modify or replace the FIP requirements while continuing to rely on CSAPR's trading programs to address

[1] Federal Implementation Plans; Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011) (codified as amended at 40 CFR 52.38 and 52.39 and 40 CFR part 97).

[2] In reliance on the December 5, 2017 conditional approval, allocations of CSAPR NO_X Annual and CSAPR SO_2 Group 1 allowances for the 2017, 2018, 2019, and 2020 control periods were based on the state-determined allocation methodology. Following the state's failure to submit by December 29, 2017, allocations of allowances for those programs for the 2021 and 2022 control periods were based on the default allowance allocation provisions in the federal trading program regulations.

[3] 81 FR 74504 (October 26, 2016).

the states' obligations to mitigate interstate air pollution. Section III describes the specific criteria for approval of such SIP revisions. Section IV contains the EPA's analysis of New York's SIP submittal, and Section V sets forth EPA's action on New York's submittals.

II. Background on CSAPR and CSAPR-Related SIP Revisions

The EPA issued CSAPR in July 2011 to address the requirements of CAA section 110(a)(2)(D)(i)(I) concerning interstate transport of air pollution. As amended (including the 2016 CSAPR Update), CSAPR requires 27 Eastern states to limit their statewide emissions of SO_2 and/or NO_X to mitigate transported air pollution unlawfully impacting other states' ability to attain or maintain four NAAQS: The 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, the 1997 Ozone NAAQS, and the 2008 Ozone NAAQS. The CSAPR emissions limitations are defined in terms of maximum statewide ''budgets'' for emissions of annual SO_2, annual NO_X, and/or ozone season NO_X by each covered state's large EGUs. The CSAPR state budgets are implemented in two phases of generally increasing stringency, with the Phase 1 budgets applying to emissions in 2015 and 2016, and the Phase 2 (and CSAPR Update) budgets applying to emissions in 2017 and later years. As a mechanism for achieving compliance with the emissions limitations, CSAPR establishes five federal emissions trading programs: A program for annual NO_X emissions, two geographically separate programs for annual SO_2 emissions, and two geographically separate programs for ozone season NO_X emissions. CSAPR also establishes FIP requirements applicable to the large EGUs in each covered state. The CSAPR FIP provisions require each state's EGUs to participate in up to three of the five CSAPR trading programs.

CSAPR includes provisions under which states may submit and the EPA will approve SIP revisions to modify or replace the CSAPR FIP requirements while allowing states to continue to meet their transport-related obligations using either CSAPR's federal emissions trading programs or state emissions trading programs integrated with the federal programs.[4] Through such a SIP revision, a state may replace EPA's default provisions for allocating emission allowances among the state's units, employing any state-selected methodology to allocate or auction the allowances, subject to timing criteria and limits on overall allowance quantities. In the case of CSAPR's federal trading programs for ozone season NO_X emissions (or integrated state trading programs), a state may also expand trading program applicability to include certain smaller EGUs.[5] If a state wants to replace CSAPR FIP requirements with SIP requirements under which the state's units participate in a state trading program that is integrated with and identical to the federal trading program even as to the allocation and applicability provisions, the state may submit a SIP revision for that purpose as well. However, no emissions budget increases or other substantive changes to the trading program provisions are allowed. A state whose units are subject to multiple CSAPR FIPs and federal trading programs may submit SIP revisions to modify or replace either some or all of those FIP requirements.

States can submit two basic forms of CSAPR-related SIP revisions effective for emissions control periods in 2017 or later years.[6] Specific criteria for approval of each form of SIP revision are set forth in the CSAPR regulations, as described in section III below. Under the first alternative—an ''abbreviated'' SIP revision—a state may submit a SIP revision that upon approval replaces the default allowance allocation and/or applicability provisions of a CSAPR federal trading program for the state.[7] Approval of an abbreviated SIP revision leaves the corresponding CSAPR FIP and all other provisions of the relevant federal trading program in place for the state's units.

Under the second alternative—a ''full'' SIP revision—a state may submit a SIP revision that upon approval replaces a CSAPR federal trading program for the state with a state trading program integrated with the federal trading program, so long as the state trading program is substantively identical to the federal trading program or does not substantively differ from the federal trading program except as discussed above with regard to the allowance allocation and/or applicability provisions.[8] For purposes of a full SIP revision, a state may either adopt state rules with complete trading program language, incorporate the federal trading program language into its state rules by reference (with appropriate conforming changes), or employ a combination of these approaches.

The CSAPR regulations identify several important consequences and limitations associated with approval of a full SIP revision. First, upon the EPA's approval of a full SIP revision as correcting the deficiency in the state's SIP that was the basis for a particular set of CSAPR FIP requirements, the obligation to participate in the corresponding CSAPR federal trading program is automatically eliminated for units subject to the state's jurisdiction without the need for a separate EPA withdrawal action, so long as the EPA's approval of the SIP is full and unconditional.[9] Second, approval of a full SIP revision does not terminate the obligation to participate in the corresponding CSAPR federal trading program for any units located in any Indian country within the borders of the state, and if and when a unit is located in Indian country within a state's borders, the EPA may modify the SIP approval to exclude from the SIP, and include in the surviving CSAPR FIP instead, certain trading program provisions that apply jointly to units in the state and to units in Indian country within the state's borders.[10] Finally, if at the time a full SIP revision is approved EPA has already started recording allocations of allowances for a given control period to a state's units, the federal trading program provisions authorizing the EPA to complete the process of allocating and recording allowances for that control period to those units will continue to apply, unless the EPA's approval of the SIP revision provides otherwise.[11]

III. Criteria for Approval of CSAPR-Related SIP Revisions

Each CSAPR-related abbreviated or full SIP revision must meet the following general submittal criteria:

- *Timeliness and completeness of SIP submittal.* If a state wants to replace the default allowance allocation or applicability provisions of a CSAPR federal trading program, the complete SIP revision must be submitted to the EPA by December 1 of the year before

[4] *See* 40 CFR 52.38, 52.39. States also retain the ability to submit SIP revisions to meet their transport-related obligations using mechanisms other than the CSAPR federal trading programs or integrated state trading programs.

[5] States covered by both the CSAPR Update and the NO_X SIP Call have the additional option to expand applicability under the CSAPR NO_X Ozone Season Group 2 Trading Program to include non-EGUs that would have participated in the former NO_X Budget Trading Program.

[6] CSAPR also provides for a third, more streamlined form of SIP revision that is effective only for control periods in 2016 and is not relevant here. *See* § 52.38(a)(3), (b)(3), (b)(7); § 52.39(d), (g).

[7] § 52.38(a)(4), (b)(4), (b)(8); § 52.39(e), (h).

[8] § 52.38(a)(5), (b)(5), (b)(9); § 52.39(f), (i).

[9] § 52.38(a)(6), (b)(10(i); § 52.39(j).

[10] § 52.38(a)(5)(iv)–(v), (a)(6), (b)(5)(v)–(vi), (b)(9)(vi)–(vii), (b)(10)(i); § 52.39(f)(4)–(5), (i)(4)–(5), (j).

[11] § 52.38(a)(7), (b)(11)(i); § 52.39(k).

the deadlines described below for submitting allocation or auction amounts to EPA for the first control period for which the state wants to replace the default allocation and/or applicability provisions.[12] This SIP submission deadline is inoperative in the case of a SIP revision that seeks only to replace a CSAPR FIP and federal trading program with a SIP and a substantively identical state trading program integrated with the federal trading program. The SIP submittal completeness criteria in section 2.1 of appendix V to 40 CFR part 51 also apply.

In addition to the general submittal criteria, a CSAPR-related abbreviated or full SIP seeking to address the allocation or auction of emission allowances must meet the following further criteria:

• *Methodology covering all allowances potentially requiring allocation.* For each federal trading program addressed by a SIP revision, the SIP revision's allowance allocation or auction methodology must replace both the federal program's default allocations to existing units[13] at 40 CFR 97.411(a), 97.511(a), 97.611(a), 97.711(a), or 97.811(a) as applicable, and the federal trading program's provisions for allocating allowances from the new unit set-aside (NUSA) for the state at 40 CFR 97.411(b)(1) and 97.412(a), 97.511(b)(1) and 97.512(a), 97.611(b)(1) and 97.612(a), 97.711(b)(1) and 97.712(a), or 97.811(b)(1) and 97.812(a), as applicable.[14] In the case of a state with Indian country within its borders, while the SIP revision may neither alter nor assume the federal program's provisions for administering the Indian country NUSA for the state, the SIP revision must include procedures addressing the disposition of any otherwise unallocated allowances from an Indian country NUSA that may be made available for allocation by the state after EPA has carried out the Indian country NUSA allocation procedures.[15]

• *Assurance that total allocations will not exceed the state budget.* For each federal trading program addressed by a SIP revision, the total amount of allowances auctioned or allocated for each control period under the SIP revision (prior to the addition by EPA of any unallocated allowances from any Indian country NUSA for the state) generally may not exceed the state's emissions budget for the control period less the sum of the amount of any Indian country NUSA for the state for the control period and any allowances already allocated to the state's units for the control period and recorded by EPA.[16] Under its SIP revision, a state is free to not allocate allowances to some or all potentially affected units, to allocate or auction allowances to entities other than potentially affected units, or to allocate or auction fewer than the maximum permissible quantity of allowances and retire the remainder. Under the CSAPR NO_X Ozone Season Group 2 Trading Program only, additional allowances may be allocated if the state elects to expand applicability to non-EGUs that would have been subject to the former NO_X Budget Trading Program established for compliance with the NO_X SIP Call.[17]

• *Timely submission of state-determined allocations to EPA.* The SIP revision must require the state to submit to the EPA the amounts of any allowances allocated or auctioned to each unit for each control period (other than allowances initially set aside in the state's allocation or auction process and later allocated or auctioned to such units from the set-aside amount) by the following deadlines shown in Tables 1 and 2 below.[18] Note that the submission deadlines differ for amounts allocated or auctioned to units considered existing units for CSAPR purposes and amounts allocated or auctioned to other units.

TABLE 1—CSAPR NO_X ANNUAL, CSAPR NO_X OZONE SEASON GROUP 1, CSAPR SO_2 GROUP 1, AND CSAPR SO_2 GROUP 2 TRADING PROGRAMS

Units	Year of the control period	Deadline for submission to EPA of allocations or auction results
Existing	2017 and 2018	June 1, 2016.
	2019 and 2020	June 1, 2017.
	2021 and 2022	June 1, 2018.
	2023 and later years	June 1 of the fourth year before the year of the control period.
Other	All years	July 1 of the year of the control period.

TABLE 2—CSAPR NO_X OZONE SEASON GROUP 2 TRADING PROGRAM

Units	Year of the control period	Deadline for submission to EPA of allocations or auction results
Existing	2019 and 2020	June 1, 2018.
	2021 and 2022	June 1, 2019.
	2023 and 2024	June 1, 2020.
	2025 and later years	June 1 of the fourth year before the year of the control period.
Other	All years	July 1 of the year of the control period.

• *No changes to allocations already submitted to EPA or recorded.* The SIP revision must not provide for any change to the amounts of allowances allocated or auctioned to any unit after those amounts are submitted to EPA or any change to any allowance allocation determined and recorded by EPA under

[12] 40 CFR 52.38(a)(4)(ii), (a)(5)(vi), (b)(4)(iii), (b)(5)(vii), (b)(8)(iv), (b)(9)(viii); § 52.39(e)(2), (f)(6), (h)(2), (i)(6).

[13] In the context of the approval criteria for CSAPR-related SIP revisions, an ''existing unit'' is a unit for which EPA has determined default allowance allocations (which could be allocations of zero allowances) in the rulemakings establishing and amending CSAPR. Spreadsheets showing EPA's default allocations to existing units are posted at *https://www.epa.gov/csapr/unit-level-allocations-under-csapr-transport-rule-fips-after-tolling* and *https://www.epa.gov/airmarkets/final-cross-state-air-pollution-rule-update.*

[14] § 52.38(a)(4)(i), (a)(5)(i), (b)(4)(ii), (b)(5)(ii), (b)(8)(iii), (b)(9)(iii); § 52.39(e)(1), (f)(1), (h)(1), (i)(1).

[15] *See* §§ 97.412(b)(10)(ii), 97.512(b)(10)(ii), 97.612(b)(10)(ii), 97.712(b)(10)(ii), 97.812(b)(10)(ii).

[16] § 52.38(a)(4)(i)(A), (a)(5)(i)(A), (b)(4)(ii)(A), (b)(5)(ii)(A), (b)(8)(iii)(A), (b)(9)(iii)(A); § 52.39(e)(1)(i), (f)(1)(i), (h)(1)(i), (i)(1)(i).

[17] § 52.38(b)(8)(iii)(A), (b)(9)(iii)(A).

[18] § 52.38(a)(4)(i)(B)–(C), (a)(5)(i)(B)–(C), (b)(4)(ii)(B)–(C), (b)(5)(ii)(B)–(C), (b)(8)(iii)(B)–(C), (b)(9)(iii)(B)–(C); § 52.39(e)(1)(ii)–(iii), (f)(1)(ii)–(iii), (h)(1)(ii)–(iii), (i)(1)(ii)–(iii).

the federal trading program regulations.[19]

• *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also expands program applicability as described below.[20] Any new definitions adopted in the SIP revision (in addition to the federal trading program's definitions) may apply only for purposes of the SIP revision's allocation or auction provisions.[21]

In addition to the general submittal criteria, a CSAPR-related abbreviated or full SIP revision seeking to expand applicability under their integrated state trading programs (which is allowed for CSAPR's NO_X ozone season programs only) must meet the following further criteria:

• *Only EGUs with nameplate capacity of at least 15 MWe.*[22] The SIP revision may expand applicability only to additional fossil fuel-fired boilers or combustion turbines serving generators producing electricity for sale, and only by lowering the generator nameplate capacity threshold used to determine whether a particular boiler or combustion turbine serving a particular generator is a potentially affected unit. The nameplate capacity threshold adopted in the SIP revision may not be less than 15 MWe.[23] In addition or alternatively, applicability may be extended to non-EGUs that would have been subject to the former NO_X Budget Trading Program established for compliance with the NO_X SIP Call.[24]

• *No other substantive changes to federal trading program provisions.* The SIP revision may not substantively change any other trading program provisions, except in the case of a SIP revision that also addresses the allocation or auction of emission allowances as described above.[25]

In addition to the general submittal criteria and the other applicable criteria described above, a CSAPR-related full SIP revision must meet the following further criteria:

• *Complete, substantively identical trading program provisions.* The SIP revision must adopt complete state trading program regulations substantively identical to the complete federal trading program regulations at 40 CFR 97.402 through 97.435, 97.502 through 97.535, 97.602 through 97.635, 97.702 through 97.735, or 97.802 through 97.835, as applicable, except as described above in the case of a SIP revision that seeks to replace the default allowance allocation and/or applicability provisions.[26]

• *Only non-substantive substitutions for the term ''State.''* The SIP revision may substitute the name of the state for the term ''State'' as used in the federal trading program regulations, but only to the extent that EPA determines that the substitutions do not substantively change the trading program regulations.[27]

• *Exclusion of provisions addressing units in Indian country.* The SIP revision may not impose requirements on any unit in any Indian country within the state's borders and must not include the federal trading program provisions governing allocation of allowances from any Indian country NUSA for the state.[28]

IV. New York's Submittals and EPA's Analysis

A. New York's SIP Submittals

On November 30, 2018, New York submitted to the EPA an abbreviated SIP revision that, if approved, would replace the default allowance allocation provisions of the CSAPR NO_X Ozone Season Group 2, CSAPR NO_X Annual, and CSAPR SO_2 Group 1 Trading Programs for the state's EGUs with provisions establishing state-determined allocations but would leave the corresponding CSAPR FIPs and all other provisions of the trading programs in place.

New York's allowance allocation procedures for ozone season NO_X allowances would replace EPA's default allocation procedures for the control periods in 2021 and beyond. New York's allowance allocation procedures for annual NO_X and SO_2 allowances would replace EPA's default allocation procedures for the control periods in 2023 and beyond.

The November 30, 2018 SIP submittal includes the following adopted state rules: 6 NYCRR Part 243, ''CSAPR NO_X Ozone Season Group 2 Trading Program,'' 6 NYCRR Part 244, ''CSAPR NO_X Annual Trading Program,'' and 6 NYCRR Part 245, ''CSAPR SO_2 Group 1 Trading Program.'' Previous versions of the rules, *i.e.,* 6 NYCRR Part 243, ''Transport Rule NO_X Ozone Season Trading Program, 6 NYCRR Part 244, ''Transport Rule NO_X Annual Trading Program,'' and 6 NYCRR Part 245, ''Transport Rule SO_2 Group 1 Trading Program,'' have been repealed and replaced in their entirety with the new rules. Attendant revisions were made to 6 NYCRR Part 200, Subpart 200.9, ''General Provisions, Referenced Material,'' to update the list of referenced material that are cited in the amended New York regulations. The regulations were adopted on November 11, 2018, and effective on January 2, 2019. New York's Parts 243, 244 and 245, submitted to EPA on November 30, 2018, allow the State to replace the provisions of the CSAPR NO_X Ozone Season Group 2, CSAPR NO_X Annual, and CSAPR SO_2 Group 1 trading program allocation methodology with its own methodology. Parts 243, 244 and 245 apply to units that serve an electrical generator with a nameplate capacity equal to or greater than 25 megawatts of electrical output and sell any amount of electricity. The control period for Part 243 runs from May 1 to September 30. The control periods for Parts 244 and 245 run from January 1 to December 31. DEC would allocate CSAPR NO_X Ozone Season Group 2 allowances beginning with the 2021 control period; and CSAPR NO_X Annual and SO_2 Group 1 allowances beginning with the 2023 control period.

For existing units, New York's allocation methodology is based on the average of recent emissions (*i.e.,* the average of the three last years for which data is available) from all New York Transport Rule units. Five percent of the statewide budgets for annual emissions of SO_2, annual emissions of NO_X, and ozone season emissions of NO_X would be set aside for new units, and the remainder of the statewide budgets, but at least ten percent, will be allocated to the Energy Efficiency and Renewable Energy Technology (EERET) account. If the allocation to the EERET account would be less than the prescribed minimum after allocations to existing units based on the 3-year average of emissions and an allocation of five percent to the new unit set-aside, allocations to existing units would be reduced proportionally by the amounts necessary to ensure that ten percent of the budget is allocated to the EERET account.

The DEC will distribute all allowances at no cost except for allowances held in the EERET account, which will be administered by the New York State Energy Research and

[19] § 52.38(a)(4)(i)(D), (a)(5)(i)(D), (b)(4)(ii)(D), (b)(5)(ii)(D), (b)(8)(iii)(D), (b)(9)(iii)(D); § 52.39(e)(1)(iv), (f)(1)(iv), (h)(1)(iv), (i)(1)(iv).

[20] § 52.38(a)(4), (a)(5), (b)(4), (b)(5), (b)(8), (b)(9); § 52.39(e), (f), (h), (i).

[21] § 52.38(a)(4)(i), (a)(5)(ii), (b)(4)(ii), (b)(5)(iii), (b)(8)(iv), (b)(9)(iv); § 52.39(e)(1), (f)(2), (h)(1), (i)(2).

[22] Megawatts of electricity

[23] § 52.38(b)(4)(i), (b)(5)(i), (b)(8)(i), (b)(9)(i).

[24] § 52.38(b)(8)(ii), (b)(9)(ii).

[25] § 52.38(b)(4), (b)(5), (b)(8), (b)(9).

[26] § 52.38(a)(5), (b)(5), (b)(9); § 52.39(f), (i).

[27] §§ 52.38(a)(5)(iii), (b)(5)(iv), (b)(9)(v); 52.39(f)(3), (i)(3).

[28] §§ 52.38(a)(5)(iv), (b)(5)(v), (b)(9)(vi); 52.39(f)(4), (i)(4).

Development Authority (NYSERDA). The sale of allowances by NYSERDA will be used to fund energy efficiency projects, renewable energy, or clean energy technology. Any EERET allowances that are not sold or distributed by NYSERDA within 12 months of the initial allocation to the EERET account will be returned to the DEC for retirement or reallocation.

On July 23, 2015, New York submitted a SIP submittal, which included a revised version of 6 NYCRR Part 200 (Subpart 200.1) that was adopted by the State. The definition for ''Air contamination source or emission source'' under Subdivision 200.1(f) was revised to address the repeal of 6 NYCRR Part 203, ''Indirect Sources of Air Contamination''. The regulation was adopted on April 18, 2013, a notice of adoption was filed on April 19, 2013, and the regulation became effective on May 19, 2013.

B. EPA's Analysis of New York's Submittals

A. November 30, 2018 Submittal

1. Timeliness and Completeness of New York's SIP Submittal

New York's SIP revision seeks to establish state-determined allocations starting with the 2021 control period for the CSAPR NO_X Ozone Season Group 2 trading program and the 2023 control period for the CSAPR NO_X Annual and SO_2 Group 1 trading programs. For the NO_X Annual and SO_2 Group 1 trading programs, under 40 CFR 52.38(a)(4)(i)(B) and 52.39(e)(1)(ii), the deadline for submission of state-determined allocations for the 2023 control periods is June 1, 2019, which under 52.38(a)(4)(ii) and 52.39(e)(2) makes December 1, 2018, the deadline for submission to the EPA of a complete SIP revision establishing state-determined allocations for those control periods. For the NO_X Ozone Season Group 2 trading program, under 40 CFR 52.38(b)(8)(iii)(B) the allocation submission deadline for the 2021 control period is June 1, 2019, triggering a December 1, 2018 deadline for a SIP submittal under 40 CFR 52.38(b)(8)(iv). New York submitted its SIP revision to EPA by letter dated and delivered electronically on November 30, 2018, and EPA has determined that the submittal complies with the applicable minimum completeness criteria of 40 CFR part 51, Appendix V, Section 2.1. New York has therefore met the requirements for timeliness and completeness criteria of its CSAPR SIP submittal for all three programs.

2. Methodology Covering All Allowances Potentially Requiring Allocation

Sections 243.3 through 243.6, 244.3 through 244.6, and 245.3 through 245.6 of the New York rules provide the allocation methodology adopted by New York in the SIP revision. Sections 243.3 through 243.6 replace the provisions of 40 CFR 97.811(a), 97.811(b)(1), and 97.812(a) for allocations of CSAPR NO_X Ozone Season Group 2 allowances; Sections 244.3 through 244.6 replace the provisions of 40 CFR 97.411(a), 97.411(b)(1), and 97.412(a) for allocations of NO_X Annual allowances; and Sections 245.3 through 245.6 replace the provisions of 40 CFR 97.611(a), 97.611(b)(1), and 97.612(a) for allocations of SO_2 Group 1 allowances. New York's methodology addresses allocation of allowances that under the default allocation provisions for the federal trading programs would be allocated to existing units as well as allowances that would be allocated to new units from the new unit set-asides established for New York under the federal trading programs. New York's rules also include provisions for the disposition of any otherwise unallocated Indian country new unit set-aside allowances. New York's rules therefore meet the conditions under 40 CFR 52.38(a)(4)(i), 52.38(b)(8)(iii), 52.39(e)(1), 97.412(b)(10)(ii), 97.612(b)(10)(ii), and 97.812(b)(10)(ii) that the state's allocation methodology must cover all allowances potentially requiring allocation by the state.

3. Assurance That Total Allocations Will Not Exceed the State Budget

Sections 243.3, CSAPR NO_X Ozone Season Group 2 Trading Program budgets, 244.3, CSAPR NO_X Annual Trading Program budgets, and 245.3, CSAPR SO_2 Group 1 Trading Program budgets, set forth the total amounts of CSAPR NO_X Ozone Season Group 2 allowances, CSAPR NO_X Annual allowances, and CSAPR SO_2 Group 1 allowances to be allocated to New York units for each control period under the state trading programs.

Section 243.3 provides for allowance allocations equal to New York's NO_X Ozone Season Group 2 trading budget at 40 CFR 97.810(a)(15), which is 5,135 tons, less the amount of the Indian country new unit set-aside (5 tons). Section 244.3 provides for allowance allocations equal to New York's NO_X Annual trading budget at 40 CFR 97.410(a)(14), which is 21,722 tons, less the amount of the Indian country new unit set-aside (22 tons). Section 245.3 provides for allowance allocations equal to New York's SO_2 Group 1 budget at 40 CFR 610(a)(9), which is 27,556 tons, less the amount of the Indian country new unit set-aside (28 tons). EPA has not yet allocated or recorded any allowances to New York units for the control periods for which New York's rules would establish a state-determined allocation methodology. The allocation methodology in New York's SIP revision, therefore, meets the conditions under 40 CFR 52.38(a)(4)(i)(A), 52.38(b)(8)(iii)(A), and 52.39(e)(1)(i) that the total amount of allowances allocated under the SIP revision may not exceed the state's budget for the control period less the amount of the Indian country NUSA for the state and any allowances already allocated and recorded by the EPA.

4. Timely Submission of State-Determined Allocations to EPA

Sections 243.4, 244.4, and 245.4 provide for allowance allocations for existing units to be submitted to the EPA. With respect to CSAPR NO_X Ozone Season Group 2 allowance allocations for existing units, Section 243.4 provides that New York will submit allocations for the 2021 and 2022 control periods by June 1, 2019; the state will submit allocations for the 2023 and 2024 control periods by June 1, 2020; and by June 1, 2021, and June 1st of each year thereafter, the state will submit allocations for the control period in the fourth year following the year of the submission deadline. With respect to CSAPR NO_X Annual and CSAPR SO_2 Group 1 allowance allocations for existing units, Sections 244.4 and 245.4 provide that the state will submit allocations by June 1, 2019,[29] and by June 1st of each year thereafter, for the control period in the fourth year following the year of the submission deadline.

With respect to NUSA allowance allocations under all three programs, Sections 243.5(a)(7), 244.5(a)(7), and 245.5(a)(7) indicate that the state will submit state-determined allocations to the EPA by July 1st of the control period.

New York's SIP revision meets the criteria under 40 CFR 52.38(a)(4)(i)(B)–(C), 52.38(b)(8)(iii)(B)–(C), and 52.39(e)(1)(ii)–(iii) requiring that the SIP revision provide for submission of state-determined allowance allocations to EPA by the deadlines specified in those provisions.

[29] Allowance allocations for the 2023 control period would be submitted by June 1, 2019.

5. No Changes to Allocations Already Submitted to EPA or Recorded

The New York rules include no provisions allowing alteration of allocations after the allocation amounts have been provided to the EPA and no provisions allowing alteration of any allocations made and recorded by the EPA under the federal trading program regulations, thereby meeting the condition under 40 CFR 52.38(a)(4)(i)(D), 52.38(b)(8)(iii)(D), and 52.39(e)(1)(iv).

6. No Other Substantive Changes to Federal Trading Program Provisions

In addition to the allowance allocation provisions in New York's rules, Sections 243.1, 244.1 and 245.1 address applicability and Sections 243.2, 244.2, and 245.2 set forth relevant definitions. The applicability provisions and most of the definitions directly reference the corresponding provisions in the federal trading program regulations, and the remaining definitions do not conflict with the definitions in the federal trading program regulations. The EPA has therefore determined that the SIP revision meets the requirements of 40 CFR 52.38(a)(4), 52.38(b)(8), and 52.39(e) by making no substantive changes to the federal trading program regulations beyond the provisions addressing allowance allocations.

Finally, as stated in section I, the EPA conditionally approved previous versions of 6 NYCRR Parts 200, 244 and 245 in an action published on December 5, 2017 (82 FR 57362), but the state did not submit a revised SIP that addressed EPA-identified deficiencies within the required time frame New York's November 30, 2018 SIP revision approved in this direct final action does fully address the deficiencies that the EPA identified in the December 5, 2017 final action.

7. Removal of CAIR Trading Program Provisions

As discussed earlier, New York's CSAPR rules were adopted to replace previous versions of 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 which implemented New York's discontinued CAIR trading programs. For the reasons discussed below, the EPA is also taking direct final action to approve the removal of New York's CAIR rules from the SIP. The rules being removed from the SIP are 6 NYCRR Part 243, ''CAIR NO_X Ozone Season Trading Program,''; 6 NYCRR Part 244, ''CAIR NO_X Annual Trading Program,''; and 6 NYCRR Part 245, ''CAIR SO_2 Trading Program.'' All three of the CAIR trading programs have been discontinued and are no longer operated by EPA. Electricity generating units (EGUs) in New York now participate in the CSAPR NO_X Ozone Season Group 2 Trading Program, CSAPR NO_X Annual Trading Program, and CSAPR SO_2 Group 1 Trading Program.

In 2005, EPA promulgated CAIR (70 FR 25162, May 12, 2005) to address transported emissions that significantly contributed to downwind states' nonattainment and interfered with maintenance of the 1997 ozone and $PM_{2.5}$ NAAQS. CAIR required 28 states, including New York, to revise their SIPs to reduce emissions of NO_X and SO_2, precursors to the formation of ambient ozone and $PM_{2.5}$. Under CAIR, EPA provided model state rules for separate cap-and-trade programs for annual NO_X, ozone season NO_X, and annual SO_2. New York submitted, and EPA approved, a CAIR SIP revision based on the model state rules establishing CAIR state trading programs for annual SO_2, annual NO_X, and ozone season NO_X emissions, with certain non-EGUs included in the state's CAIR ozone season NO_X trading program. See 73 FR 4109 (January 24, 2008).

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in 2008, but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR. *North Carolina* v. *EPA,* 531 F.3d 896, modified, 550 F.3d 1176 (2008). The ruling allowed CAIR to remain in effect temporarily until a replacement rule consistent with the court's opinion was developed. While EPA worked on developing a replacement rule, the CAIR program continued as planned with the NO_X annual and ozone season programs beginning in 2009 and the SO_2 annual program beginning in 2010.

On August 8, 2011 (76 FR 48208), acting on the D.C. Circuit's remand, EPA promulgated CSAPR to replace CAIR in order to address the interstate transport of emissions contributing to nonattainment and interfering with maintenance of the two air quality standards covered by CAIR as well as the 2006 $PM_{2.5}$ NAAQS. CSAPR promulgated FIPs requiring EGUs in affected states, including New York, to participate in federal trading programs to reduce annual SO_2, annual NO_X, and/or ozone season NO_X emissions. The rule also contained provisions that would sunset CAIR-related obligations on a schedule coordinated with the implementation of the CSAPR compliance requirements.

CSAPR was intended to become effective January 1, 2012; however, the timing of CSAPR's implementation was impacted by subsequent litigation. CSAPR implementation was stayed during the course of litigation in the D.C. Circuit and the Supreme Court, until the D.C. Circuit lifted the stay on October 23, 2014. EPA subsequently issued an interim final rule on December 3, 2014 (79 FR 71663), setting the updated effective date of CSAPR as January 1, 2015.[30] In accordance with the interim final rule, EPA stopped administering the CAIR state and federal trading programs with respect to emissions occurring after December 31, 2014, and EPA began implementing CSAPR on January 1, 2015.

EPA has not administered the CAIR trading programs since January 1, 2015, when the CSAPR trading programs replaced the CAIR trading programs. The provisions in New York's SIP which were promulgated and approved for purposes of implementing the CAIR trading programs in the State have not been implemented since that time and cannot be implemented now or in the future. Because the EPA no longer administers the CAIR trading programs, and therefore New York's own CAIR trading program regulations cannot be implemented, removing New York's CAIR rules from the state's SIP will have no consequences for any source's operations or emissions or for the attainment and maintenance of the NAAQS in any area, now or in the future. Accordingly, removal of the CAIR rules does not impact the state's continued compliance with section CAA 110(a)(2)(D)(i)(I) for any NAAQS. Moreover, consistent with CAA section 110(l), the EPA has determined that the removal of New York's CAIR trading program rules will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Clean Air Act.

Current emission levels in New York further demonstrate that the CAIR trading programs are not influencing and would not influence affected sources' operations. As shown in Table 3 below, current emissions levels are significantly below the CAIR budgets even while the CAIR trading programs are no longer being implemented.

[30] EPA solicited comment on the interim final rule and subsequently issued a final rule affirming the amended compliance schedule after consideration of comments received. 81 FR 13275 (March 14, 2016).

TABLE 3—COMPARISON OF NEW YORK CAIR BUDGETS AND 2018 EMISSIONS

[Tons]

Type of emissions	CAIR phase I budget [1]	CAIR phase 2 budget [1]	2018 emissions [2]
Ozone season NO_X [3]	31,091	27,652	5,790
Annual NO_X	45,617	38,014	9,706
SO_2	135,139	94,597	4,889

[1] The CAIR budget amounts are from the EPA's proposal to approve New York's CAIR regulations into the SIP. 72 FR 55723 (Oct. 1, 2007); *see also* 73 FR 4109 (Jan. 24, 2008) (finalizing approval).

[2] The 2018 emissions totals are from the EPA's Air Markets Program Database, *https://ampd.epa.gov.*

[3] The ozone season NO_X budgets and emissions include both EGUs and non-EGUs meeting the applicability criteria for New York's former NO_X Budget Trading Program.

EGUs in New York also remain subject to FIPs, as modified by the abbreviated SIPs approved in this direct final action, requiring the sources to particulate in annual NO_X, annual SO_2, and ozone season NO_X [31] federal trading programs under CSAPR and the CSAPR Update that limit emissions from such sources in the State. EGUs also continue to be subject to part 75 monitoring requirements under the current CSAPR trading program rules.

The EPA notes that New York's CAIR trading program for ozone season NO_X addressed not only the state's transport obligation under the 1997 ozone NAAQS, but also New York's ongoing obligations under the NO_X SIP Call.[32] Under the NO_X SIP Call the New York SIP must (1) include enforceable control measures for ozone season NO_X mass emissions from large EGUs and large non-EGUs and (2) require those sources to monitor and report ozone season NO_X emissions, which may be in accordance with 40 CFR part 75. See 40 CFR 51.121(f)(2) and (i).

With respect to the NO_X SIP Call requirement that the SIP include enforceable control measures to limit ozone season NO_X, New York is currently subject to the federal CSAPR trading program for ozone season NO_X that addresses these requirements as to EGUs, but because New York's non-EGUs are not subject to that CSAPR trading program, the state must meet this requirement for non-EGUs through other SIP provisions. New York's SIP has not included enforceable control measures for these non-EGUs since 2015, when EPA began implementing the CSAPR trading programs and stopped administering the CAIR trading programs. Thus, this gap in SIP coverage was caused by EPA's discontinuation of the CAIR trading programs and predates the SIP submittal at issue in this action. Removing the state's CAIR rules from the SIP at this time will not exacerbate or otherwise affect this pre-existing lack of enforceable control measures in the SIP, and as noted above, the removal will have no impact on source operations or emissions.

As to the requirement for sources to monitor and report ozone season NO_X emissions under the NO_X SIP Call, removal of the state's CAIR rules from the state's SIP does not eliminate the state's current requirements for EGUs and non-EGUs to monitor and report their ozone season NO_X emissions, as required under the NO_X SIP Call. New York's SIP still includes the state's NO_X Budget Trading Program rules, and those rules continue to require, at 6 NYCRR Part 204, that EGUs and non-EGUs monitor and report ozone season NO_X emissions under part 75 even though EPA is no longer administering the trading program provisions of the state's rules. Thus, removal of the state's CAIR rules for ozone season NO_X emissions from New York's SIP will not eliminate the provisions for monitoring that are required by the NO_X SIP Call because the SIP will still include equivalent ozone season NO_X monitoring provisions in the state's NO_X Budget Trading Program rules.

Accordingly, EPA finds that it is appropriate to approve the rescission of New York's CAIR rules from the SIP.

B. July 23, 2015 Submittal

The July 23, 2015 New York SIP submittal included a revised version of 6 NYCRR Part 200 (Subpart 200.1), which modified the definition of ''Air contamination source or emission source'' at Subdivision 200.1(f). The regulation was adopted on April 18, 2013, the notice of adoption was filed on April 19, 2013 and regulation became effective on May 19, 2013. The SIP submittal was deemed administratively complete by operation of law on January 23, 2016. The EPA is taking direct final action to approve the July 23, 2015 SIP submittal.

V. EPA's Action on New York's Submittals

The EPA is taking direct final action to approve the New York SIP revision submitted on November 30, 2018 concerning allocations to New York units of CSAPR NO_X Ozone Season Group 2 allowances for the control periods in 2021 and beyond and of CSAPR NO_X Annual allowances and CSAPR SO_2 Group 1 allowances for the control periods in 2023 and beyond. This rule approves into the New York SIP amendments to 6 NYCRR Parts 243, 244 and 245 that incorporate CSAPR requirements into the State rules and allows the DEC to allocate CSAPR allowances to regulated entities in New York. The EPA is also taking direct final action approving the attendant revisions to 6 NYCRR Part 200 (Subpart 200.9) to update the list of referenced materials cited in the amended New York regulations. The EPA is taking direct final action to approve the New York SIP revision submitted on July 23, 2015, which included a revised version of 6 NYCRR Part 200 (Subpart 200.1) to address updated definitions associated with a repeal of 6 NYCRR Part 203, ''Indirect Sources of Air Contamination''.

The EPA is also taking direct final action to repeal from the SIP previous versions of 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 which implemented New York's discontinued CAIR trading program. The rules being repealed from the SIP are 6 NYCRR Part 243, ''CAIR NO_X Ozone Season Trading Program,''; 6 NYCRR Part 244, ''CAIR NO_X Annual Trading Program,''; and 6 NYCRR Part 245, ''CAIR SO_2 Trading Program.''

[31] The D.C. Circuit ultimately remanded New York's CSAPR Phase 2 budget for ozone season NO_X, finding that the rulemaking record did not support EPA's determination of a transport obligation under the 1997 ozone NAAQS for New York. *EME Homer City Generation, L.P.,* v. *EPA,* 795 F.3d 118, 129–30, (2015). In response, EPA withdrew New York's remanded budget in the CSAPR Update rulemaking; concurrently, however, EPA promogulated a new emission budget to address the 2008 ozone NAAQS, which replaced the invalidated CSAPR budget intended to address the 1997 ozone NAAQS. 81 FR 74524. Thus, EGUs in New York remain subject to a CSAPR trading program for ozone-season NO_X.

[32] The NO_X SIP Call addresses states' transport obligations under the 1979 ozone NAAQS.

Following the approval into the SIP of the revisions to 6 NYCRR Parts 200, 243, 244, and 245, allocations of CSAPR NO_X Ozone Season Group 2 allowances, CSAPR NO_X Annual allowances, and CSAPR SO_2 Group 1 allowances will be made according to the provisions of New York's SIP instead of 40 CFR 97.411(a), 97.411(b)(1), 97.412(a), 97.611(a), 97.611(b)(1), 97.612(a), CFR 97.811(a), 97.811(b)(1), and 97.812(a). The EPA's action on this SIP revision does not alter any provisions of the federal CSAPR NO_X Ozone Season Group 2 Trading Program, the federal CSAPR NO_X Annual Trading Program, and the federal CSAPR SO_2 Group 1 Trading Program as applied to New York units other than the allowance allocation provisions, and the FIPs requiring the units to participate in the programs (as modified by this SIP revision) remain in place. The EPA's is approving Parts 200, 243, 244 and 245 because New York's rules meet the requirements of the CAA and EPA's regulations for an abbreviated SIP revision and will replace EPA's default allocations of CSAPR emission allowances with state-determined allocations, as discussed in section IV.A above.

VI. Incorporation By Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of revisions to 6 NYCRR Parts 200, Subpart 200.1, entitled ''General Provisions, Definitions,'' adopted April 18, 2013; 6 NYCRR Part 200, Subpart 200.9, entitled ''General Provisions, Referenced Material,'' adopted on November 11, 2018; 6 NYCRR Part 243, entitled ''CSAPR NO_X Ozone Season Group 2 Trading Program,'' adopted November 11, 2018; 6 NYCRR Part 244, entitled ''CSAPR NO_X Annual Trading Program,'' adopted November 11, 2018; and NYCRR Part 245, entitled ''CSAPR SO_2 Group 1 Trading Program,'' adopted November 11, 2018. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov,* and at the EPA Region 2 Office. Copies of materials incorporated may be inspected at the Environmental Protection Agency, Region 2, Air Programs Branch, 290 Broadway, New York, New York 10007. Please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information. Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update of the SIP compilation.[33]

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen Dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Authority: 42 U.S.C. 7401 *et seq.*

[33] 62 FR 27968 (May 22, 1997)

Dated: May 2, 2019.

Peter D. Lopez,

Regional Administrator, Region 2.

Part 52 chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52- APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

Subpart HH—New York

■ 2. In § 52.1670, paragraph (c) is amended by revising the table entries ''Title 6, Part 200, Subpart 200.1'', ''Title 6, Part 200, Subpart 200.9'', ''Title 6, Part 243'', ''Title 6, Part 244'', and ''Title 6, Part 245'' to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

EPA–APPROVED NEW YORK STATE REGULATIONS AND LAWS

State citation	Title/subject	State effective date	EPA approval date	Comments
.				
Title 6, Part 200, Subpart 200.1.	General Provisions, Definitions.	05/19/2013	5/21/19	The word odor is removed from the Subpart 200.1(d) definition of ''air contaminant or air pollutant.'' Redesignation of non-attainment areas to attainment areas (200.1(av)) does not relieve a source from compliance with previously applicable requirements as per letter of Nov. 13, 1981 from H. Hovey, NYSDEC. Changes in definitions are acceptable to EPA unless a previously approved definition is necessary for implementation of an existing SIP regulation. EPA is including the definition of ''federally enforceable'' with the understanding that (1) the definition applies to provisions of a Title V permit that are correctly identified as federally enforceable, and (2) a source accepts operating limits and conditions to lower its potential to emit to become a minor source, not to ''avoid'' applicable requirements. • EPA is approving incorporation by reference of those documents that are not already federally enforceable. • EPA approval finalized at [insert **Federal Register** citation]
*	* * *	*	*	* * *
Title 6, Part 200, Subpart 200.9.	General Provisions, Referenced Material.	01/02/2019	5/21/19	• EPA is approving reference documents that are not Federally enforceable. • EPA approval finalized at [insert **Federal Register** citation].
*	* * *	*	*	* * *
Title 6, Part 243	CSAPR NO_X Ozone Season Group 2 Trading Program.	01/02/2019	5/21/19	• EPA approval finalized at [insert **Federal Register** citation]
Title 6, Part 244	CSAPR NO_X Annual Trading Program.	01/02/2019	5/21/19	• EPA approval finalized at [insert **Federal Register** citation]
Title 6, Part 245	CSAPR SO_2 Group 1 Trading Program.	01/02/2019	5/21/19	• EPA approval finalized at [insert **Federal Register** citation]
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[FR Doc. 2019–10479 Filed 5–20–19; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0609; FRL–9993–90–Region 4]

Air Plan Approval; Kentucky: Jefferson County Process Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve changes to the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Energy and Environment Cabinet (Cabinet), by way of a letter dated March 15, 2018. The SIP revision was submitted by the Cabinet on behalf of the Louisville Metro Air Pollution Control District (District) and makes minor ministerial amendments to regulations regarding new and existing process operations.

DATES: This rule will be effective June 20, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R04–OAR–2018–0609. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division (formerly the Air, Pesticides and Toxics Management Division), U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8966. Mr. Febres can also be reached via electronic mail at *febres-martinez.andres@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

EPA is taking final action to approve changes to the Jefferson County portion of the Kentucky SIP that were provided to EPA through a letter dated March 15, 2018.[1] EPA is finalizing approval of the portions of this SIP revision that make changes to the District's Regulation 6.09—*Standards of Performance for Existing Process Operations,* and Regulation 7.08—*Standards of Performance for New Process Operations*.[2] The March 15, 2018, SIP revision makes minor and ministerial changes that do not alter the meaning of these regulations but rather are intended to clarify the applicability of these regulations, as well as reduce redundancy in the particulate matter (PM) and opacity standards. The SIP revision updates the current SIP-approved versions of Regulation 6.09 (version 6) and Regulation 7.08 (version 3) to version 7 and version 4, respectively.

In a notice of proposed rulemaking (NPRM) published on March 4, 2019 (84 FR 7313), EPA proposed to approve the aforementioned changes to Regulations 6.09 and 7.08 in the Jefferson County portion of the Kentucky SIP, which address the control of emissions from existing and new process operations, respectively. The NPRM provides additional details regarding EPA's action. Comments on the NPRM were due on or before April 3, 2019. EPA received no comments on the proposed action, so EPA is now taking final action to approve the above-referenced revision.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Jefferson County's Regulation 6.09, *Standards of Performance for Existing Process Operations,* version 7, and Regulation 7.08, *Standards of Performance for New Process Operations,* version 4, both State effective January 17, 2018. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

III. Final Action

EPA is taking final action to approve changes to the Jefferson County portion of the Kentucky SIP that were provided to EPA through a letter dated March 15, 2018. Specifically, EPA is approving the District's Regulation 6.09, version 7, and Regulation 7.08, version 4. The March 15, 2018, SIP revision makes minor and ministerial changes and is intended to clarify the applicability of these regulations, as well as reduce redundancy in the PM and opacity standards. These rule adoptions do not contravene Federal permitting requirements or existing EPA policy, nor will they impact the National Ambient Air Quality Standards or interfere with any other applicable requirement of the Act.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735,

[1] EPA notes that the Agency received the SIP revision on March 23, 2018.

[2] EPA also notes that the Agency received several other revisions to the Jefferson County portion of the Kentucky SIP submitted with the same March 15, 2018, cover letter. EPA will be considering action on the remaining revisions in separate actions.

[3] *See* 62 FR 27968 (May 22, 1997).

October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 6, 2019.

Mary S. Walker,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart S—Kentucky

■ 2. In § 52.920, table 2 in paragraph (c) is amended by revising the entries ''6.09'' and ''7.08'' to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	**Federal Register** notice	District effective date	Explanation
	* * * * * * *				
Reg 6—Standards of Performance for Existing Affected Facilities					
	* * * * * * *				
6.09	Standards of Performance for Existing Process Operations.	5/21/19 in the **Federal Register**]	[insert **Federal Register** citation]	1/17/18	
	* * * * * * *				
Reg 7—Standards of Performance for New Affected Facilities					
	* * * * * * *				
7.08	Standards of Performance for New Process Operations.	5/21/19 in the **Federal Register**]	[insert **Federal Register** citation]	1/17/18	
	* * * * * * *				

* * * * *

[FR Doc. 2019–10573 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0064; FRL–9993–89–Region 4]

Air Plan Approval; Georgia: Permit Exemption for Fire Fighting Equipment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve two revisions to the Georgia State Implementation Plan (SIP), submitted by the State of Georgia, through the Georgia Environmental Protection Division (Georgia EPD), with two letters dated November 13, 2017, and July 31, 2018. Specifically, EPA is approving changes that revise existing exemptions for firefighting equipment. EPA is approving these SIP revisions because the Agency believes that they are consistent with the Clean Air Act (CAA or Act).

DATES: This rule will be effective June 20, 2019.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R04–OAR–2018–0064. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division (formerly the Air, Pesticides and Toxics Management Division), U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8966. Mr. Febres can also be reached via electronic mail at *febres-martinez.andres@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Through a letter dated November 13, 2017, Georgia EPD submitted a SIP revision for EPA's approval that included several miscellaneous rule amendments.[1] Specifically, the November 13, 2017, SIP revision included changes to Georgia's Air Quality Control Rule 391–3–1–.01—''Definitions,'' Rule 391–3–1–.02(4)—''Ambient Air Standards,'' Rule 391–3–1–.02(7)—''Prevention of Significant Deterioration of Air Quality,'' Rule 391–3–1–.03(6)—''Exemptions,'' Rule 391–3–1–.03(8)—''Permit Requirements,'' and Rule 391–3–1–.03(10)—''Title V Operating Permits.''

Through an additional letter dated July 31, 2018, Georgia EPD submitted several SIP revisions that included some miscellaneous rule amendments.[2] Specifically, the July 31, 2018, SIP revisions included changes to Georgia's Air Quality Control Rule 391–3–1–.01—''Definitions,'' Rule 391–3–1–.02(2)(c)—''Incinerators,'' Rule 391–3–1–.02(4)—''Ambient Air Standards,'' Rule 391–3–1–.02(12)—''Cross State Air Pollution Rule NO_X Annual Trading Program,'' Rule 391–3–1–.02(13)—''Cross State Air Pollution Rule SO_2 Annual Trading Program,'' Rule 391–3–1–.02(14)—''Cross State Air Pollution Rule NO_X Ozone Season Trading Program,'' Rule 391–3–1–.03(6)—''Exemptions,'' Rule 391–3–1–.03(11)—''Permit by Rule,'' Rule 391–3–1–.03(10)—''Title V Operating Permits,'' Rule 391–3–1–.11—''Small Business Assistance Administration,'' and Rule 391–3–1–.12—''Duties of the Small Business Ombudsman Office.''

In a notice of proposed rulemaking (NPRM) published on February 1, 2019, (84 FR 1037), EPA proposed to approve revisions to the Georgia's Rule 391–3–1–.03(6), which addresses exemptions for firefighting equipment from minor new source review (NSR) requirements. EPA provided further analysis of these revisions, as well as the Agency's rationale for approving the changes, in its NPRM. Comments on the NPRM were due on or before March 4, 2019. EPA received no adverse comments on the proposed action. EPA is now taking final action to approve the above-referenced revision.

II. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Georgia EPD's Rule 391–3–1–.03(6)—''Exemptions,'' which became state effective July 23, 2018. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[3]

III. Final Action

EPA is approving Georgia EPD's November 13, 2017, and July 31, 2018, SIP revisions. Specifically, EPA is approving these SIP revisions that modify Georgia's Rule 391–3–1–.03(6). The changes at Georgia Rule 391–3–1–.03(6)(b)(13) exempt fire pumps and other equipment used by firefighters and other emergency personnel to fight fires from the Act's preconstruction review requirement. As discussed in further detail in EPA's February 1, 2019, (84 FR 1037) NPRM, the Agency believes that any air quality impacts from these activities are de minimis and will often lead to net emissions reductions by mitigating or eliminating the air quality impacts of uncontrolled fires. EPA is approving these SIP revisions because the Agency has determined that they are consistent with the CAA and will not interfere with attainment or maintenance of any NAAQS, reasonable further progress, or any other applicable requirement.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the

[1] EPA notes that the Agency received this submittal on November 29, 2017.

[2] EPA notes that the Agency received this submittal on August 2, 2018.

[3] *See* 62 FR 27968 (May 22, 1997).

Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2019. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 6, 2019.

Mary S. Walker,

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

Subpart L—Georgia

■ 2. In § 52.570, the table in paragraph (c) is amended by revising the entry ''391–3–1–.03(6)'' to read as follows:

§ 52.570 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED GEORGIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
	Permits			
*	*	*	*	*
391–3–1–.03(6)	Exemptions	7/23/2018	5/21/2019, [insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

[FR Doc. 2019–10563 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 84, No. 98
Tuesday, May 21, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–0352; Product Identifier 2019–NE–09–AD]

RIN 2120–AA64

Airworthiness Directives; GE Honda Aero Engines Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all GE Honda Aero Engines (GHAE) HF120 turbofan engines with a certain fuel pump metering unit (FPMU) assembly. This proposed AD was prompted by damage found on the permanent magnetic alternator (PMA) drive gear within the FPMU assembly. This proposed AD would require removal of a certain FPMU assembly and its replacement with a part eligible for installation. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by July 5, 2019.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact GE Honda Aero Engines, LLC, 9050 Centre Pointe Drive, Suite 200, West Chester, OH 45069; phone 513–552–7820; email: *info@honda-aero.com;* internet: *www.gehonda.com.* You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0352; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Michael Richardson-Bach, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *michael.richardson-bach@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2019–0352; Product Identifier 2019–NE–09–AD'' at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to *http://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

Discussion

The FAA was notified of an incident on a flight test engine that resulted in the loss of over speed protection warning. GHAE's subsequent investigation found damage on the PMA drive gear teeth within the FPMU assembly, which was likely due to dynamic loads on the drive gear that exceeded the material capability. This condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

Related Service Information

The FAA reviewed GHAE HF120 Service Bulletin (SB) 73–0016 R01, dated November 8, 2018. The SB describes procedures for replacement of the FPMU assembly.

FAA's Determination

The FAA is proposing this AD because it evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require removal of a certain FPMU assembly and its replacement with a part eligible for installation.

Costs of Compliance

The FAA estimates that this proposed AD affects 161 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace the FPMU	6.5 work-hours × $85 per hour = $552.50	$50,000	$50,552.50	$8,138,952.50

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Will not affect intrastate aviation in Alaska, and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

GE Honda Aero Engines: Docket No. FAA–2019–0352; Product Identifier 2019–NE–09–AD.

(a) Comments Due Date

The FAA must receive comments by July 5, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all GE Honda Aero Engines (GHAE) HF120 turbofan engines with fuel pump metering unit (FPMU) assembly, part number (P/N) 24100–Q0A–F000, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7314, Engine Fuel Pump.

(e) Unsafe Condition

This AD was prompted by damage found on the permanent magnetic alternator (PMA) drive gear within the FPMU assembly. The FAA is issuing this AD to prevent failure of the FPMU assembly. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

Within 20 engine hours after the effective date of this AD, or before accumulating 600 engine hours time since new, whichever occurs later, remove the affected FPMU assembly and replace it with a part eligible for installation.

(h) Installation Prohibition

After the effective date of this AD, do not install on any engine a FPMU assembly, P/N 24100–Q0A–F000.

(i) Definition

For the purposes of this AD, a ''part eligible for installation'' is:

(1) A FPMU assembly, P/N 24100–Q0A–G000 or P/N 24100–Q0A–F100; or

(2) a FPMU assembly, P/N 24100–Q0A–F000, that is rebuilt and marked as P/N 24100–Q0A–G000 or P/N 24100–Q0A–F100.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (k)(1) of this AD. You may email your request to: *ANE-AD-AMOC@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

(1) For more information about this AD, contact Michael Richardson-Bach, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *michael.richardson-bach@faa.gov*.

(2) For service information identified in this AD, contact GE Honda Aero Engines, LLC, 9050 Centre Pointe Drive, Suite 200, West Chester, OH 45069; phone 513–552–7820; email: *info@honda-aero.com;* internet: *www.gehonda.com.* You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued in Burlington, Massachusetts, on May 15, 2019.

Robert J. Ganley,

Manager, Engine & Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2019–10525 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–120186–18]

RIN 1545–BP04

Investing in Qualified Opportunity Funds

Correction

In proposed rule document 2019–08075 beginning on page 18652 in the issue of Wednesday, May 1, 2019 make the following correction:

On pages 18652 through 18693 the date at the top of the page should read ''Wednesday, May 1, 2019''.

[FR Doc. C1–2019–08075 Filed 5–20–19; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2019–0267]

RIN 1625–AA00

Safety Zone for Fireworks Display; Patapsco River-Middle Branch, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain waters of the Middle Branch of the Patapsco River. This action is necessary to provide for the safety of life on these navigable waters of the Middle Branch of the Patapsco River at Baltimore, MD on July 4, 2019, during a fireworks display to commemorate the July 4th holiday. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Maryland-National Capital Region or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 20, 2019.

ADDRESSES: You may submit comments identified by docket number USCG–2019–0267 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Mr. Ron Houck, Sector Maryland-National Capital Region Waterways Management Division, U.S. Coast Guard; telephone 410–576–2674, email *Ronald.L.Houck@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Fusion Group of Baltimore, MD, notified the Coast Guard that it will be conducting a fireworks display from 9:30 to 9:48 p.m. on July 4, 2019, to commemorate the July 4th Holiday. The fireworks are to be launched from a barge in the Middle Branch of the Patapsco River approximately 400 yards west of the Hanover Street (SR–2) Bridge in Baltimore, MD. There is no alternate date scheduled for this fireworks display in the event of inclement weather. Hazards from the firework display include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. The COTP Maryland-National Capital Region has determined that potential hazards associated with the fireworks to be used in this display would be a safety concern for anyone within an 800-foot radius of the barge.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within an 800-foot radius of the fireworks barge before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone from 8:30 p.m. to 11 p.m. on July 4, 2019. The safety zone would cover all navigable waters within 800 feet of a barge in the Middle Branch of the Patapsco River in approximate position latitude 39°15′31.67″ N, longitude 076°37′13.95″ W, located at Baltimore, MD. The duration of the safety zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled 9:30 to 9:48 p.m. fireworks display. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on size, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of the Middle Branch of the Patapsco River for less than 3 hours during the evening when vessel traffic is normally low. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will

not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting less than three hours that would prohibit entry within 800 feet of a fireworks barge. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *https://www.regulations.gov/privacyNotice.*

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–0267 to read as follows:

§ 165.T05–0267 Safety Zone for Fireworks Display; Patapsco River-Middle Branch, Baltimore, MD.

(a) *Location.* The following area is a safety zone: All navigable waters of the Middle Branch of the Patapsco River, within 800 feet of a fireworks barge in the in approximate position latitude 39°15′31.67″ N, longitude 076°37′13.95″ W, located at Baltimore, MD. All coordinates refer to datum NAD 1983.

(b) *Definitions.* As used in this section:

(1) *Captain of the Port (COTP)* means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

(2) *Designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Maryland-National Capital Region to assist in enforcing the safety zone described in paragraph (a) of this section.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. All vessels underway within this safety zone at the time it is activated are to depart the zone.

(2) To seek permission to enter, contact the COTP or the COTP's designated representative by telephone at 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted

on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 8:30 p.m. to 11 p.m. on July 4, 2019.

Dated: May 15, 2019.

Joseph B. Loring,

Captain, U.S. Coast Guard Captain of the Port Maryland-National Capital Region.

[FR Doc. 2019–10526 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AQ54

Veterans Healing Veterans Medical Access and Scholarship Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations that govern scholarships to certain health care providers. This rulemaking would implement the mandates of the VA MISSION Act of 2018 by establishing a pilot program to provide funding for the medical education of eligible veterans who are enrolled in covered medical schools.

DATES: Comments must be received on or before July 22, 2019.

ADDRESSES: Written comments may be submitted through *www.Regulations .gov;* by mail or hand-delivery to: Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1064, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to ''RIN 2900–AQ54—Veterans Healing Veterans Medical Access and Scholarship Program.'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1064, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Marjorie A. Bowman, MD, Chief Academic Affiliations Officer, Office of Academic Affiliations (10X1), U.S. Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, *Marjorie.Bowman@va.gov,* (202) 461–9490. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On June 6, 2018, section 304 of Public Law 115–182, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018, or the VA MISSION Act of 2018, established a pilot program that would provide funding for medical education to 18 eligible veterans who enroll in covered medical schools. This is known as the Veterans Healing Veterans Medical Access and Scholarship Program (VHVMASP). For the VHVMASP, the VA MISSION Act of 2018 sets forth the eligibility criteria; the amount and types of available funding; established terms of an agreement to be entered into by the participant; as well as, the consequences for a breach in such agreement. This proposed rule would establish the regulations needed to carry out the VHVMASP. Immediately following title 38 of the Code of Federal Regulations (CFR) 17.612, we would add a new undesignated center heading titled ''Veterans Healing Veterans Medical Access and Scholarship Program'' and add new §§ 17.613 through 17.618 as discussed in further detail below.

Section 17.613 Purpose

Proposed § 17.613 would establish the purpose for §§ 17.613 through 17.618. We would state that the purpose for §§ 17.613 through 17.618 is to establish the requirements for the Veterans Healing Veterans Medical Access and Scholarship Program (VHVMASP). The VHVMASP will provide funding for the medical education of two eligible veterans from each covered medical school. This would be consistent with this requirement in section 304 of the VA MISSION Act of 2018.

Section 17.614 Definitions

Proposed § 17.614 would establish the definitions for proposed §§ 17.613 through 17.618. We would define ''acceptable level of academic standing'' as maintaining a cumulative grade point average at or above passing, as determined by the medical school; completing all required courses with a passing grade; successfully completing the required course of study for graduation within four academic years; successfully passing the required United States Medical Licensing Examinations steps 1 and 2, within the timeframe for graduation from medical school; and having no final determinations of unprofessional conduct or behavior.

We would define ''covered medical school'' to mean any of the following nine schools: Texas A&M College of Medicine, Quillen College of Medicine at East Tennessee State University, Boonshoft School of Medicine at Wright State University, Joan C. Edwards School of Medicine at Marshall University, University of South Carolina School of Medicine, Charles R. Drew University of Medicine and Science, Howard University College of Medicine, Meharry Medical College, and Morehouse School of Medicine. Consistent with section 304 of the VA MISSION Act of 2018, these institutions would be the only qualifying medical schools that may submit participants for the VHVMASP.

We would define ''VA'' to mean the Department of Veterans Affairs. We would also define ''VHVMASP'' to mean the Veterans Healing Veterans Medical Access and Scholarship Program authorized by section 304 of the VA MISSION Act of 2018.

Section 17.615 Eligibility

Proposed § 17.615 would restate the eligibility criteria of section 304 of the VA MISSION Act of 2018 that a veteran must meet in order to qualify for the VHVMASP. We would state that an eligible veteran is one who: Has been discharged or released under conditions other than dishonorable from the Armed Forces for a period of not more than 10 years before the date of application for admission to a covered medical school; would not be concurrently receiving educational assistance under Chapter 30, 31, 32, 33, 34, or 35 of title 38 United States Code or chapter 1606 or 1607 of title 10 United States Code at the time the veteran would be receiving VHVMASP funding; applies for admission to a covered medical school for the entering class of 2020; indicates on the application to the covered medical school that they would like to be considered for the VHVMASP; meets the minimum admissions criteria for the covered medical school to which the eligible veteran applies; and agrees to the terms stated in proposed § 17.617.

Section 17.616 Award Procedures

Proposed § 17.616 would state how VA would distribute the VHVMASP funds as well as the amount VA would pay to participants while enrolled in the covered school. This would be consistent with the distribution and amount of funds stipulated in section 304 of the VA MISSION Act of 2018. Proposed paragraph § 17.616(a)(1) would state that each covered medical school that opts to participate in the VHVMASP would reserve two seats in the entering class of 2020 for eligible veterans who would receive funds for the VHVMASP. VA would award funds to two eligible veterans with the highest admissions ranking among veteran applicants for such entering class for each covered medical school. The VA MISSION Act of 2018 provided for the eventuality that an eligible veteran would not apply for admissions at a covered medical school. As such, proposed § 17.616(a)(2) would state such eventuality that if two or more eligible veterans do not apply for admission at a covered medical school for the entering class of 2020, VA will distribute the available funding to eligible veterans who applied, and are accepted for admission at other covered medical schools.

Proposed § 17.616(b) would state the funds that an eligible veteran would receive while participating in the VHVMASP would be equal to the actual cost of the following: Tuition at the covered medical school for which the veteran enrolls for a period of not more than 4 years; Books, fees, and technical equipment; Fees associated with the National Residency Match Program; Two away rotations performed during the fourth year of school at a VA medical facility; and a monthly stipend for the four-year period during which the eligible veteran is enrolled in a covered medical school in an amount to be determined by VA.

Section 17.617 Agreement and Obligated Service

As a condition of accepting funds from the VHVMASP, eligible veterans must agree to certain terms in order to continue to receive funds. Section 304 of the VA MISSION Act of 2018 establishes these terms of the agreement and proposed § 17.617(a) would list these terms of agreement between VA and the eligible veteran. The terms of the agreement are: ''Maintain enrollment, attendance, and acceptable level of academic standing as defined by the covered medical school; Complete post-graduate training leading to eligibility for board certification in a physician specialty applicable to VA; after completion of medical school and post-graduate training, obtain and maintain a license to practice medicine in a State. Eligible veterans must ensure that State licenses are obtained in a minimal amount of time following completion of residency, or fellowship, if the veteran is enrolled in a fellowship program approved by Veterans Affairs. If a participant fails to obtain his or her degree or fails to become licensed in a State no later than 90 days after completion of residency, or fellowship, if applicable, the participant is considered to be in breach of the acceptance agreement. The participant must serve as a full-time clinical practice employee in VA for a period of four years.

In order to make clear to potential participants when the period of obligated service will commence, we would state in proposed § 17.617(b) that the obligated service will begin on the date on which the eligible veteran begins full-time permanent employment with VA as a clinical practice employee. VA will appoint the participant to such position as soon as possible, but no later than 90 days after the date that the participant completes his residency, or fellowship, if applicable, or the date the participant becomes licensed in a State, whichever is later. We would also add that VA reserves the right to make final decisions on the location and position of the obligated service. This would allow VA to assign the participants to locations where there is a shortage in the participant's health care specialty. These two clarifications are in alignment with other VA scholarship programs.

17.618 Failure To Comply With Terms and Conditions of Agreement

As previously stated in this rulemaking, section 304 of the VA MISSION Act of 2018 established that the eligible veteran must agree to certain terms to receive funding for the VHVMASP. However, if the eligible veteran breaches this agreement, the United States government is entitled to recover damages ''in an amount equal to the total amount of VHVMASP funding received by the eligible veteran.'' We would state these consequences of the breach of the terms of the agreement in proposed § 17.618(a). In alignment with other VA scholarship programs, we would also state in proposed paragraph § 17.618(b) that the ''eligible veteran will pay the amount of damages that the United States is entitled to recover under this section in full to the United States no later than 1 year after the date of the breach of the agreement.''

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This proposed rule includes provisions constituting new collections of information under the Paperwork Reduction Act of 1995 that require approval by the OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed 38 CFR 17.617 contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provision containing a collection of information or take such other action as is directed by OMB.

Comments on the collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to the Director, Office of Regulation and Policy Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington, DC 20420; fax to (202) 273–9026; or through *www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AQ54—Veterans Healing Veterans Medical Access and Scholarship Program.''

OMB is required to make a decision concerning the collections of information contained in this proposed final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if the comment is received within 30 days of publication. This does not affect the 60-day deadline for the public to comment on the proposed rule.

VA considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The collections of information contained in 38 CFR 17.617 are described immediately following this paragraph. For the new proposed collection of information below, VA used general wage data from the Bureau of Labor Statistics (BLS) to estimate the respondents' costs associated with completing the information collection. According to the latest available BLS data, the mean hourly wage of full-time wage and salary workers was $24.34 based on the BLS wage code—''00–0000 All Occupations.'' This information was taken from the following website: *https://www.bls.gov/oes/current/oes_nat.htm* (May 2017).

Title: Veterans Healing Veterans Medical Access and Scholarship Program.

OMB Control No.: 2900–xxxx (new).

CFR Provision: 38 CFR 17.617.

Summary of collection of information: The VHVMASP provides funding for the medical education of eligible veterans who enroll in a covered medical school. As part of the VHVMASP, the eligible veteran agrees to a period of obligated service with VA for a period of no less than 48 months. The information collected under this section would require eligible veterans to sign and submit an agreement between VA and the eligible veteran who accepts funding for the VHVMASP.

Description of the need for information and proposed use of information: The collection of information is necessary to establish an agreement between VA and the eligible veteran, which would hold the eligible veteran accountable for upholding the terms and conditions of the agreement and alert the eligible veteran of the consequences of a breach in the agreement.

Description of likely respondents: Eligible veterans who are accepted for participation in the VHVMASP.

Estimated number of respondents per month/year: 18 per year.

Estimated frequency of responses per month/year: 1 per year.

Estimated average burden per response: 5 hours per response.

Estimated total annual reporting and recordkeeping burden: 90 hours per year.

Estimated cost to respondents per year: VA estimates the total cost to all respondents to be $2190.60 per year (90 burden hours × $24.34/hour). Legally, respondents may not pay a person or business for assistance in completing the information collection. Therefore, there are no expected overhead costs for completing the information collection.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking would be exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Orders 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action,'' which requires review by the Office of Management and Budget (OMB), as ''any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.''

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined that the action is not a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm* by following the link for VA Regulations Published from FY 2004 through FYTD.

This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles for this rule.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care,

Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on April 8, 2019, for publication.

Dated: May 14, 2019.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

* * * * *

Sections 17.613 through 17.618 are also issued under Public Law 115–182, sec. 304.

* * * * *

■ 2. Add an undesignated center heading immediately following § 17.612 and new §§ 17.613 through 17.618 to read as follows.

Veterans Healing Veterans Medical Access and Scholarship Program

Veterans Healing Veterans Medical Access and Scholarship Program

§ 17.613 Purpose.

The purpose of §§ 17.613 through 17.618 is to establish the requirement for the Veterans Healing Veterans Medical Access and Scholarship Program (VHVMASP). The VHVMASP will provide funding for the medical education of two eligible veterans from each covered medical school.

§ 17.614 Definitions.

The following definitions apply to §§ 17.613 through 17.618.

Acceptable level of academic standing means maintaining a cumulative grade point average at or above passing, as determined by the medical school; completing all required courses with a passing grade; successfully completing the required course of study for graduation within four academic years; successfully passing the required United States Medical Licensing Examinations steps 1 and 2, within the timeframe for graduation from medical school; and having no final determinations of unprofessional conduct or behavior.

Covered medical school means any of the following:

(1) Texas A&M College of Medicine.

(2) Quillen College of Medicine at East Tennessee State University.

(3) Boonshoft School of Medicine at Wright State University.

(4) Joan C. Edwards School of Medicine at Marshall University.

(5) University of South Carolina School of Medicine.

(6) Charles R. Drew University of Medicine and Science.

(7) Howard University College of Medicine.

(8) Meharry Medical College.

(9) Morehouse School of Medicine.

VA means the Department of Veterans Affairs.

VHVMASP means the Veterans Healing Veterans Medical Access and Scholarship Program authorized by section 304 of the VA MISSION Act of 2018.

§ 17.615 Eligibility.

A veteran is considered eligible to receive funding for the VHVMASP if such veteran meets the following criteria.

(a) Has been discharged or released, under conditions other than dishonorable, from the Armed Forces for not more than 10 years before the date of application for admission to a covered medical school;

(b) Is not concurrently receiving educational assistance under chapter 30, 31, 32, 33, 34, or 35 of title 38 United States Code or chapter 1606 or 1607 of title 10 United States Code at the time the veteran would be receiving VHVMASP funding;

(c) Applies for admission to a covered medical school for the entering class of 2020;

(d) Indicates on the application to the covered medical school that they would like to be considered for the VHVMASP;

(e) Meets the minimum admissions criteria for the covered medical school to which the eligible veteran applies; and

(f) Agrees to the terms stated in § 17.617.

§ 17.616 Award procedures.

(a) *Distribution of funds.* (1) Each covered medical school that opts to participate in the VHVMASP will reserve two seats in the entering class of 2020 for eligible veterans who receive funds for the VHVMASP. Funding will be awarded to two eligible veterans with the highest admissions ranking among veteran applicants for such entering class for each covered medical school.

(2) If two or more eligible veterans do not apply for admission at a covered medical school for the entering class of 2020, VA will distribute the available funding to eligible veterans who applied, and are accepted, for admission at other covered medical schools.

(b) *Amount of funds.* An eligible veteran will receive funding from the VHVMASP equal to the actual cost of the following:

(1) Tuition at the covered medical school for which the veteran enrolls for a period of not more than 4 years;

(2) Books, fees, and technical equipment;

(3) Fees associated with the National Residency Match Program;

(4) Two away rotations, performed during the fourth year of school, at a VA medical facility; and

(5) A monthly stipend for the four-year period during which the eligible veteran is enrolled in a covered medical school in an amount to be determined by VA.

§ 17.617 Agreement and obligated service.

(a) *Agreement.* Each eligible veteran who accepts funds from the VHVMASP will enter into an agreement with VA where the eligible veteran agrees to the following:

(1) Maintain enrollment, attendance, and acceptable level of academic standing as defined by the covered medical school;

(2) Complete post-graduate training leading to eligibility for board certification in a physician specialty applicable to VA;

(3) After completion of medical school and post-graduate training, obtain and maintain a license to practice medicine in a State. Eligible Veterans must ensure that State licenses are obtained in a minimal amount of time following completion of residency, or fellowship, if the Veteran is enrolled in a fellowship program approved by Veterans Affairs. If a participant fails to obtain his or her degree, or fails to become licensed in a State no later than 90 days after completion of residency, or fellowship, if applicable, the

participant is considered to be in breach of the acceptance agreement; and

(4) Serve as a full-time clinical practice employee in VA for a period of four years.

(b) *Obligated service.* (1) *General.* An eligible veteran's obligated service will begin on the date on which the eligible veteran begins full-time permanent employment with VA as a clinical practice employee. VA will appoint the participant to such position as soon as possible, but no later than 90 days after the date that the participant completes residency, or fellowship, if applicable, or the date the participant becomes licensed in a State, whichever is later.

(2) *Location and position of obligated service.* VA reserves the right to make final decisions on the location and position of the obligated service.

(The Office of Management and Budget has approved the information collection requirements in this section under control number XXXX–XXXX.)

§ 17.618 Failure to comply with terms and conditions of agreement.

(a) *Participant fails to satisfy terms of agreement.* If an eligible veteran who accepts funding for the VHVMASP breaches the terms of the agreement stated in § 17.617, the United States is entitled to recover damages in an amount equal to the total amount of VHVMASP funding received by the eligible veteran.

(b) *Repayment period.* The eligible veteran will pay the amount of damages that the United States is entitled to recover under this section in full to the United States no later than 1 year after the date of the breach of the agreement.

[FR Doc. 2019–10251 Filed 5–20–19; 8:45 am]

BILLING CODE 8320–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2019–4; Order No. 5095]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is initiating a rulemaking proceeding to consider changes to analytical principles relating to periodic reports on Periodicals Outside County Carrier Route Basic Flats. This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 14, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

Pursuant to § 3050.11, the Commission initiates a rulemaking proceeding to consider changes to analytical principles related to periodic reports. In particular, the Commission intends to establish the methodology for which delivery costs estimate should be used to calculate the passthroughs for Periodicals Outside County Carrier Route Basic Flats (Carrier Route Basic).

II. Proposal

Background. On April 22, 2019, MPA—The Association of Magazine Media (MPA) filed a motion requesting that the Commission amend specific portions of the FY 2018 Annual Compliance Determination Report (ACD).[1] In particular, MPA stated that the passthrough for Carrier Route Basic was incorrectly calculated, which resulted in errors on pages 19 and 20 of the FY2018 ACD. *Id.* MPA presented calculations that use alternative unit delivery costs, which result in a higher cost avoidance for Carrier Route Basic and a lower passthrough. *Id.* at 3. In its response, the Postal Service stated that it did not disagree with MPA's methodology.[2] The Postal Service explained that the delivery costs between Carrier Route Basic and Machinable Non-Auto Flats should translate into a non-zero delivery cost avoidance for Carrier Route Basic. *Id.*

Although there was no disagreement between MPA and the Postal Service on the methodology, the Commission found that the Postal Service had previously used a different methodology in prior fiscal years.[3] The Commission also found there was no rulemaking to establish the unit cost avoidance calculation, and the Postal Service had not explicitly stated why the unit cost estimate it used was the appropriate methodology. Since the calculations using either methodology would not materially change the Commission's findings in the FY 2018 ACD, the Commission denied MPA's motion for correction. Order No. 5094 at 5. However, the Commission stated that it would initiate a rulemaking to establish the appropriate methodology for use in future dockets. *Id.* at 4–5.

Proposal. The passthrough calculations for Carrier Route Basic are based on cost avoidances for mail processing and delivery. The Postal Service uses USPS Marketing Mail proxies for Periodicals delivery costs. Library Reference USPS–FY18–19 contains the FY 2018 unit delivery cost workbooks, including a workbook with delivery costs for flat-shaped mail disaggregated for whether the pieces are delivered in Flats Sequencing System (FSS) zones.[4] The ''FSSDeliveryModel18,'' Table 2, contains three estimates for both USPS Marketing Mail Flats and Carrier Route Flats costs, which are: (1) Delivery costs for pieces destinating in FSS zones, (2) delivery costs for pieces destinating in non-FSS zones, and (3) delivery costs for all pieces.

The Postal Service and the Commission have historically used delivery costs for pieces destinating in non-FSS zones to calculate the cost avoidance and passthrough for Carrier Route Basic. MPA used the delivery costs for all pieces for the unit cost estimate. MPA Motion at 3. The Postal Services did not disagree with this approach. Postal Service Response at 2.

To improve the accuracy of the avoidable cost estimates, the Commission proposes to use the delivery costs for all pieces as the unit cost estimate used to calculate the cost avoidance and passthrough for Carrier Route Basic.

Rationale and impact. In the FY 2015 ACR and FY 2015 ACD, when the proxies were first introduced, it was more appropriate to use the pieces destinating in non-FSS zones as proxies because separate prices for FSS Flats were also offered. Only pieces

[1] Docket No. ACR2018, Motion of MPA—The Association of Magazine Media for Correction of FY 2018 Annual Compliance Determination Report, April 22, 2019 (MPA Motion). *See also* Annual Compliance Determination Report, Fiscal Year 2018, April 12, 2019 (FY 2018 ACD).

[2] Docket No. ACR2018, Response of the United States Postal Service to MPA Motion Seeking Amendment of the FY 2018 Annual Compliance Determination, April 29, 2019, at 2 (Postal Service Response).

[3] *See* Docket No. ACR2018, Order Denying Motion for Correction, May 15, 2019, at 3 (Order No. 5094).

[4] Docket No. ACR2018, Library Reference USPS–FY18–19, December 28, 2018, Excel file ''FSSDeliveryModel18.xlsx.''

destinating to non-FSS zones would be prepared and processed as Carrier Route or 5-Digit. FSS Flats passthroughs were calculated using pieces destinating in FSS zones.[5] In Docket No. R2017–1, the Postal Service removed FSS Flats.[6] Since separate FSS Flats prices are no longer available, Carrier Route and 5-Digit pieces are being prepared and processed for all zones. With this pricing and operational change, it would be more accurate to use USPS Marketing Mail Flats and Carrier Route Flats for all pieces as the proxies for calculating Periodicals passthroughs.[7] MPA and the Postal Service both supported this methodology in Docket No. ACR2018.

III. Notice and Comment

The Commission initiates Docket No. RM2019–4 to establish the methodology for which delivery costs estimate should be used to calculate the passthroughs for Periodicals Outside County Carrier Route Basic Flats. Interested persons may submit comments on the Proposal no later than June 14, 2019. Pursuant to 39 U.S.C. 505, Samuel M. Poole is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2019–4 to establish the methodology for which delivery costs estimate should be used to calculate the passthroughs for Periodicals Outside County Carrier Route Basic Flats.

2. Comments by interested persons in this proceeding are due no later than June 14, 2019.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Samuel M. Poole to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2019–10507 Filed 5–20–19; 8:45 am]

BILLING CODE 7710–FW–P

[5] *See, e.g.,* Docket No. ACR2015, Library Reference USPS–FY15–3, December 29, 2015, Excel file ''FY15 3 Worksharing Discount Tables.xlsx,'' tab ''Periodicals Outside County,'' cell ''F9.''

[6] Docket No. R2017–1, United States Postal Service Notice of Market Dominant Price Adjustment, October 12, 2016.

[7] *See* accompanying Excel file ''2018 Periodicals Workshare_RM.xlsx,'' tab ''Periodicals Outside County.''

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2019–0157, FRL–9993–68–Region 2]

Approval of Air Quality Implementation Plans; New York; Cross-State Air Pollution Rule; NO_X Ozone Season Group 2, NO_X Annual and SO_2 Group 1 Trading Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the New York State Implementation Plan (SIP) addressing requirements of the Cross-State Air Pollution Rule (CSAPR). Under the CSAPR, large electricity generating units in New York are subject to Federal Implementation Plans (FIPs) requiring the units to participate in CSAPR federal trading programs for ozone season emissions of nitrogen oxides (NO_X), annual emissions of NO_X, and annual emissions of sulfur dioxide (SO_2). This action proposes to approve into New York's SIP the State's regulations that replace the default allowance allocation provisions of the CSAPR federal trading programs for ozone season NO_X, annual NO_X, and annual SO_2 emissions.

DATES: Comments must be received on or before June 20, 2019.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–R02–OAR–2019–0157, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Kenneth Fradkin, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3702, or by email at *fradkin.kenneth@epa.gov.*

SUPPLEMENTARY INFORMATION: The EPA proposes to approve New York's November 30, 2018 SIP submittal concerning CSAPR [1] trading programs for ozone-season emissions of NO_X, annual emissions of NO_X, and annual emissions of SO_2. The EPA also proposes to approve New York's revised list of definitions that was submitted to the EPA on July 23, 2015. We have published a direct final rule approving the State's SIP revision(s) in the Rules and Regulations section of this **Federal Register**, because we view this as a noncontroversial action and anticipate no relevant adverse comment. We have explained our reasons for this action in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

Large Electric Generating Units (EGUs) in New York are subject to CSAPR FIPs that require the units to participate in the federal CSAPR NO_X Ozone Season Group 2 Trading Program, the federal CSAPR NO_X Annual Trading Program, and the federal CSAPR SO_2 Group 1 Trading Program. CSAPR provides a process for the submission and approval of SIP revisions to replace certain provisions of the CSAPR FIPs while the remaining FIP provisions continue to apply. This type of CSAPR SIP is termed an abbreviated SIP.

The New York State Department of Environmental Conservation (DEC) amended portions of Title 6 of the New York Codes, Rules and Regulations (6 NYCRR) in order to incorporate CSAPR requirements into the State's rules and allow the DEC to allocate CSAPR allowances to regulated entities in New

[1] Federal Implementation Plans; Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011) (codified as amended at 40 CFR 52.38 and 52.39 and 40 CFR part 97).

York. 6 NYCRR Part 243, ''Transport Rule NO_X Ozone Season Trading Program,'' has been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 243, ''CSAPR NO_X Ozone Season Group 2 Trading Program.'' 6 NYCRR Part 244, ''Transport Rule NO_X Annual Trading Program,'' has been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 244, ''CSAPR NO_X Annual Trading Program.'' 6 NYCRR Part 245, ''Transport Rule SO_2 Group 1 Trading Program,'' has also been repealed and replaced in its entirety with a new rule, 6 NYCRR Part 245, ''CSAPR SO_2 Group 1 Trading Program.'' Attendant revisions were made to 6 NYCRR Part 200, ''General Provisions,'' to update the list of referenced materials at Subpart 200.9 that are cited in the amended New York regulations.

The EPA is proposing to approve into the New York SIP the revised versions of 6 NYCRR Parts 200 (Subpart 200.9), 243, 244, and 245 included in the November 30, 2018 submission.

The EPA is also proposing to repeal from the SIP previous versions of 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 which implemented New York's discontinued CAIR program. New York adopted amendments to 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 that repealed and replaced CAIR trading program rules with CSAPR trading rules on November 10, 2015. Subsequently, on November 11, 2018, New York adopted amendments to 6 NYCRR Part 243, 6 NYCRR Part 244, and 6 NYCRR Part 245 that repealed and replaced the November 15, 2015 adopted rules that implemented New York's CSAPR program with new versions of New York's CSAPR trading program rules. The rules that are proposed to be repealed from the SIP are 6 NYCRR Part 243, ''CAIR NO_X Ozone Season Trading Program,'' 6 NYCRR Part 244, ''CAIR NO_X Annual Trading Program,'' and 6 NYCRR Part 245, ''CAIR SO_2 Trading Program.''

The EPA is also proposing to approve into the New York SIP a revised version of 6 NYCRR Part 200 (Subpart 200.1) to address updated definitions at Part 200.1(f) that were submitted to the EPA on July 23, 2015 and that were associated with a repeal of 6 NYCRR Part 203, ''Indirect Sources of Air Contamination.''

The revised versions of 6 NYCRR Parts 200 (Subpart 200.9), 243, 244, and 245 included in the November 30, 2018 SIP submission replace the previous versions of those rules that were included in a December 1, 2015 SIP submission. The EPA identified deficiencies in the December 1, 2015 submission but on November 20, 2017 conditionally approved those previous versions of Parts 200, 244, and 245 (but not Part 243) into the SIP (82 FR 57362, December 5, 2017). In a July 6, 2017 letter to the EPA, New York committed to submitting a SIP revision that addressed the identified deficiencies by December 29, 2017. However, New York's response to the conditional approval was not submitted to the EPA by December 29, 2017. The November 30, 2018 SIP submittal addresses the identified deficiencies, but was submitted approximately 11 months late, so the conditional approval is treated as a disapproval.

The EPA did not take action on the previous version of 6 NYCRR Part 243 included in New York's December 1, 2015 submission. Following that submission, the EPA finalized the CSAPR Update rule [2] to address Eastern states' interstate air pollution mitigation obligations with regard to the 2008 Ozone National Ambient Air Quality Standard (NAAQS). Among other things, starting in 2017 the CSAPR Update required New York EGUs to participate in the new CSAPR NO_X Ozone Season Group 2 Trading Program instead of the earlier CSAPR NO_X Ozone Season Trading Program (now renamed the ''Group 1'' program) and replaced the ozone season budget for New York with a lower budget developed to address the revised and more stringent 2008 Ozone NAAQS. In a July 14, 2016 letter to the EPA, New York indicated that the State would revise 6 NYCRR Part 243 to conform with the final CSAPR Update. As indicated earlier in this section New York repealed 6 NYCRR Part 243 and replaced the rule in its entirety with a new rule, 6 NYCRR Part 243, ''CSAPR NOx Ozone Season Group 2 Trading Program''.

This action proposes to approve into New York's SIP state-determined allowance allocation procedures for ozone-season NO_X allowances that would replace EPA's default allocation procedures for the control periods in 2021 and beyond. Additionally, EPA is proposing to approve into New York's SIP state-determined allowance allocation procedures for annual NO_X and SO_2 allowances that would replace EPA's default allocation procedures for the control periods in 2023 and beyond. The proposed approval of this SIP revision does not alter any provision, other than the allowance allocation provisions, of either the CSAPR NO_X Ozone Season Group 2 Trading Program, the CSAPR NO_X Annual Trading Program or the CSAPR SO_2 Group 1 Trading Program as applied to New York units. The FIP provisions requiring those units to participate in the programs (as modified by this SIP revision) remain in place.

[2] 81 FR 74504 (October 26, 2016).

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 2, 2019.

Peter D. Lopez,

Regional Administrator, Region 2.

[FR Doc. 2019–10470 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2018–0387; FRL–9993–95–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Approval of the Redesignation Request for the Washington, DC-MD-VA 2008 8-Hour Ozone National Ambient Air Quality Standard Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a request from the District of Columbia (the District) to redesignate to attainment their portion of the Washington, DC-MD-VA nonattainment area (hereafter ''the Washington Area'' or ''the Area'') for the 2008 8-hour ozone national ambient air quality standard (NAAQS or standard) (also referred to as the 2008 ozone NAAQS). EPA has already approved, as a revision to the District's SIP, a maintenance plan that demonstrates maintenance of the 2008 ozone NAAQS through 2030 in the Washington Area. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before June 20, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2018–0387 at *https://www.regulations.gov,* or via email to *spielberger.susan@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for

submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sara Calcinore, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2043. Ms. Calcinore can also be reached via electronic mail at *calcinore.sara@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What action is EPA proposing?

In this action, EPA is proposing to approve the District's March 12, 2018 redesignation request as satisfying the requirements of CAA section 107(d)(3)(E) and redesignate the District from marginal nonattainment to attainment of the 2008 ozone NAAQS. EPA has already approved, as a revision to the District's SIP, a maintenance plan that demonstrates maintenance of the 2008 ozone NAAQS through 2030 in the Washington Area. *See* 84 FR 15108 (April 15, 2019).

II. What is the background for this proposed action?

Under the CAA, EPA establishes NAAQS for criteria pollutants to protect human health and the environment. In response to scientific evidence linking ozone exposure to adverse health effects, EPA promulgated the first ozone NAAQS, the 0.12 part per million (ppm) 1-hour ozone NAAQS, in 1979. *See* 44 FR 8202 (February 8, 1979). The CAA requires EPA to review and reevaluate the NAAQS every 5 years in order to consider updated information regarding the effects of the criteria pollutants on human health and the environment. On July 18, 1997, EPA promulgated a revised ozone NAAQS, referred to as the 1997 ozone NAAQS, of 0.08 ppm averaged over eight hours. 62 FR 38855. This 8-hour ozone NAAQS was determined to be more protective of public health than the previous 1979 1-hour ozone NAAQS. In 2008, EPA strengthened the 8-hour ozone NAAQS from 0.08 to 0.075 ppm. The 0.075 ppm standard is referred to as the 2008 ozone NAAQS. *See* 73 FR 16436 (March 27, 2008).

Upon promulgation of a new or revised NAAQS, section 107(d)(1)(B) of the CAA requires EPA to designate as nonattainment any areas that are violating the NAAQS based on the most recent three years of quality-assured ozone monitoring data. On May 21, 2012 and June 11, 2012, EPA designated nonattainment areas for the 2008 ozone NAAQS. 77 FR 30088 and 77 FR 34221. Effective July 20, 2012, the Washington Area was designated as marginal nonattainment for the 2008 ozone NAAQS. The Washington Area consists of the Counties of Calvert, Charles, Frederick, Montgomery, and Prince George's in Maryland, the Counties of Arlington, Fairfax, Loudoun, and Prince William and the Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park in Virginia, and the District of Columbia. *See* 40 CFR 81.309, 81.321, and 81.347.

Section 107(d)(3)(E) of the CAA allows redesignation of an area to attainment of the NAAQS provided that: (1) The Administrator (EPA) determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k) of the CAA; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP, applicable Federal air pollutant control regulations, and other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A of the CAA; and (5) the State containing the area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

On March 12, 2018, February 5, 2018, and January 3, 2018, the District, Maryland, and Virginia, respectively, formally submitted requests to redesignate their portions of the Washington Area from marginal nonattainment to attainment for the 2008 ozone NAAQS. The District, Maryland, and Virginia concurrently submitted, as revisions to their respective SIPs, a joint maintenance plan for the Washington Area prepared by the Metropolitan Washington Council of Governments (MWCOG) that demonstrates maintenance of the 2008 ozone NAAQS through 2030 in the Washington Area. On April 15, 2019, EPA approved, as revisions to the District's, Maryland's, and Virginia's SIPs, the joint maintenance plan for the Washington Area. 84 FR 15108. In the April 15, 2019 action, EPA also approved Maryland and Virginia's requests to redesignate to attainment their portions of the Washington Area from marginal nonattainment to attainment of the 2008 ozone NAAQS.

On April 16, 1992, EPA provided guidance on redesignations in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 (57 FR 13498) and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. ''Ozone and Carbon Monoxide Design Value Calculations,'' Memorandum from Bill Laxton, Director, Technical Support Division, June 18, 1990;

2. ''Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;

3. ''Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;

4. ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (the ''Calcagni memorandum'');

5. ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;

6. ''Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;

7. ''State Implementation Plan (SIP) requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993 (the ''Shapiro memorandum'');

8. ''Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993;

9. ''Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

10. ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

III. What is EPA's analysis of the District's redesignation request for the Washington area?

A. Has the Washington area attained the 2008 Ozone NAAQS?

For redesignation of a nonattainment area to attainment, the CAA requires EPA to determine that the area has attained the applicable NAAQS. *See* CAA section 107(d)(3)(E)(i). An area is attaining the 2008 ozone NAAQS if it meets the 2008 ozone NAAQS, as determined in accordance with 40 CFR 50.15 and appendix P of part 50, based on three complete, consecutive calendar years of quality-assured air quality data for all monitoring sites in the area. To attain the NAAQS, the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations, referred to as ozone design values, at each monitor must not exceed 0.075 ppm.[1] The air quality data must be collected and quality-assured in accordance with 40 CFR part 58 and recorded in EPA's Air Quality System (AQS). Ambient air quality monitoring data for the 3-year period must also meet data completeness requirements. An ozone design value is valid if daily maximum 8-hour average concentrations are available for at least 90 percent of the days within the ozone monitoring season,[2] on average, for the three-year period, with a minimum data completeness of 75 percent during the ozone monitoring season of any year during the three-year period. *See* section 2.3 of appendix P to 40 CFR part 50.

On November 14, 2017 (82 FR 52651), in accordance with section 181(b)(2)(A) of the CAA and Provisions for Implementation of the 2008 Ozone NAAQS (40 CFR part 51, subpart AA), EPA made a determination that the Washington Area attained the 2008 ozone NAAQS by the July 20, 2016 attainment date.[3] EPA's determination was based upon three years of complete, certified, and quality-assured data for the 2013–2015 monitoring period.

In addition, EPA has reviewed the most recent ambient air quality monitoring data for ozone in the Area, including preliminary 2016–2018 design values, as submitted by the District, Maryland, and Virginia and recorded in EPA's AQS. The quality-assured, quality-controlled, and state-certified 2014 to 2017 ozone air quality data, as well as the preliminary 2016–2018 design values, show that the Washington Area continues to attain the 2008 ozone NAAQS. This data is summarized in Table 1 and is also included in the docket for this rulemaking available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0387.

TABLE 1—WASHINGTON AREA 2014–2016, 2015–2017, AND PRELIMINARY 2016–2018 OZONE DESIGN VALUES

AQS site ID	Site description	Jurisdiction	Annual 4th highest reading (ppm)					2014–2016 design value (ppm)	2015–2017 design value (ppm)	2016–2018 design value (ppm) [4]
			2014	2015	2016	2017	2018			
11–001–0041 [5]	420 34th Street NE, Washington, DC 20019.	District of Columbia.	.....	.....	0.065	0.056	0.050	0.056	0.060	0.057
11–001–0043 ..	2500 1st Street NW, Washington, DC.	District of Columbia.	0.068	0.072	0.072	0.071	0.073	0.070	0.071	0.072
11–001–0050 ..	300 Van Buren Street NW, Washington, DC 20012.	District of Columbia.	0.069	0.72	0.071	0.067	0.073	0.070	0.070	0.070

[1] The rounding convention under 40 CFR part 50, appendix P dictates that concentrations shall be reported in ppm to the third decimal place, with additional digits to the right of the third decimal place truncated. Thus, a computed three-year average ozone concentration of 0.0759 ppm or lower would meet the standard, but 0.0760 ppm or higher would be over the standard.

[2] The ozone season is defined by state in 40 CFR 58 appendix D. For the 2013–2015 time period, the ozone season was April-October for the states in the Area. Beginning in 2016, the ozone season is March-October for the states in the Washington Area. *See* 80 FR 65292, 65466–67 (October 26, 2015).

[3] As part of the final rule, ''Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan (SIP) Requirements,'' for the 2008 ozone NAAQS (80 FR 12264, March 6, 2015) (hereinafter, SIP Requirements Rule), EPA modified the maximum attainment dates for all nonattainment areas for the 2008 ozone NAAQS to be consistent with the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *NRDC* v. *EPA,* 777 F .3d 456, 464–69 (D.C. Cir. 2014). The SIP Requirements Rule established a maximum deadline for marginal nonattainment areas to attain the 2008 ozone NAAQS of three years from the effective date of designation, or July 20, 2015. *See* 80 FR at 12268; 40 CFR 51.1103. On May 4, 2016, EPA determined that the Washington Area did not attain the 2008 ozone NAAQS by its July 20, 2015 attainment date, based on ambient air quality monitoring data for the 2012–2014 monitoring period. In that same action, EPA determined that the Washington Area qualified for a 1-year extension of its attainment date, as provided in section 181(a)(5) of the CAA and interpreted by regulation at 40 CFR 51.1107. With that final rulemaking action, the new attainment date for the Washington Area was July 20, 2016. *See* 81 FR 26697 (May 4, 2016).

TABLE 1—WASHINGTON AREA 2014–2016, 2015–2017, AND PRELIMINARY 2016–2018 OZONE DESIGN VALUES—Continued

AQS site ID	Site description	Jurisdiction	Annual 4th highest reading (ppm)					2014–2016 design value (ppm)	2015–2017 design value (ppm)	2016–2018 design value (ppm) [4]
			2014	2015	2016	2017	2018			
24–009–0011 ..	350 Stafford Road	Maryland	0.070	0.067	0.070	0.066	0.067	0.069	0.067	0.067
24–017–0010 ..	14320 Oaks Road	Maryland	0.070	0.068	0.073	0.068	0.068	0.070	0.069	0.069
24–021–0037 ..	Frederick County Airport	Maryland	0.063	0.070	0.070	0.067	0.067	0.067	0.069	0.068
24–031–3001 ..	Lathrop E. Smith Environmental Education Center.	Maryland	0.064	0.072	0.068	0.065	0.069	0.068	0.068	0.067
24–033–0030 ..	Howard University's Beltsville Laboratory.	Maryland	0.065	0.072	0.070	0.069	0.070	0.069	0.070	0.069
24–033–8003 ..	PG County Equestrian Center	Maryland	0.069	0.069	0.073	0.072	0.070	0.070	0.071	0.071
24–033–9991 ..	Powder Mill Rd Laurel, MD 20708.	Maryland	0.069	0.067	0.070	0.070	0.073	0.068	0.069	0.071
51–013–0020 ..	S 18th and Hayes St	Virginia	0.071	0.073	0.072	0.070	0.070	0.072	0.071	0.070
51–059–0030 ..	STA. 46–B9, Lee Park, Telegraph Road.	Virginia	0.065	0.072	0.073	0.068	0.066	0.070	0.071	0.069
51–107–1005 ..	38–I, Broad Run High School, Ashburn.	Virginia	0.063	0.071	0.068	0.066	0.065	0.067	0.068	0.066
51–153–0009 ..	James S. Long Park	Virginia	0.062	0.067	0.067	0.065	0.065	0.065	0.066	0.065

EPA notes that the data for the PG County Equestrian Center monitor (AQS Site ID 24–033–8003) in Table 1 excludes data associated with exceptional event (EE) episodes for 8-hour ozone data influenced by the Fort McMurray wildfire on May 25 and 26, 2016, and northwestern Canada wildfires on July 21 and 22, 2016. The Maryland Department of the Environment (MDE) determined that the Fort McMurray and northwestern Canada wildfires caused elevated ozone concentrations at 16 and 12 monitors, respectively, throughout Maryland, including the PG County Equestrian Center monitor. By letters and enclosures dated May 26, 2017 and October 20, 2017, MDE submitted EE demonstrations related to the May and July 2016 wildfires. On December 26, 2017, EPA concurred on MDE's EE demonstration for numerous monitors, including the PG County Equestrian Center monitor.[6] Pursuant to EPA's concurrence, EPA excluded certain data, affected by the wildfires, from AQS, thereby affecting the calculated design values at the corresponding monitors. Due to the exclusion of the exceptional events data, the PG County Equestrian Center monitor's 2014–2016 design value decreased from 0.071 ppm to 0.070 ppm and the 2015–2017 design value and preliminary 2016–2018 design value decreased from 0.072 ppm to 0.071 ppm.[7] However, the design value at the PG County Equestrian Center monitor would have been below the 2008 ozone NAAQS of 0.075 ppm regardless of the exclusion of the exceptional events data.

The Washington Area's most recent monitoring data supports EPA's previous determination that the Area has attained, and continues to attain, the 2008 ozone NAAQS. In addition, as discussed in EPA's August 8, 2018 (83 FR 39019) NPRM, the District, Maryland, and Virginia have committed to continue monitoring ambient ozone concentrations in accordance with 40 CFR part 58. Therefore, EPA is proposing to determine that the Washington Area continues to attain the 2008 8-hour ozone NAAQS, which is required by CAA section 107(d)(3)(E)(i) for redesignation of a nonattainment area to attainment.

B. Has the District met all applicable requirements of section 110 and part D of the CAA for the Washington Area and does the Washington Area have a fully approved SIP under section 110(k) of the CAA?

In accordance with section 107(d)(3)(E)(v) of the CAA, in order to redesignate the Washington Area to attainment, the District must meet all requirements applicable to the Washington Area under CAA section 110 (general SIP requirements) and part D of Title I of the CAA (SIP requirements for nonattainment areas). In addition, in accordance with section 107(d)(3)(E)(ii) of the CAA, the District's SIP for the Washington Area must be fully approved under CAA section 110(k).

The September 4, 1992 Calcagni memorandum (''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) with respect to the timing of applicable requirements. Under this interpretation, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant CAA requirements that come due prior to the submittal of a complete redesignation request. *See also* Shapiro memorandum, September 17, 1993, and 60 FR 12459, 12465–12466, (March 7, 1995) (redesignation of Detroit-Ann Arbor).[8] Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. *See* CAA section 175A(c). *Sierra Club* v. *EPA,* 375 F .3d 537 (7th Cir. 2004). *See also* 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St.

[4] As noted previously, the 2016–2018 design values are preliminary.

[5] The 2014 and 2015 data at monitoring site 11–001–0041 (also referred to as ''the River Terrace monitor'') is incomplete. Therefore, the 2016 and 2017 design values are invalid. The River Terrace monitor was temporarily shut down in March 2014 due to renovations at the monitoring site. The River Terrace monitor was reinstated in 2016, and began operation in May 2016. The temporary shutdown of the River Terrace monitor is discussed in more detail in the TSD for EPA's August 8, 2018 (83 FR 39019) notice of proposed rulemaking (NPRM), which is available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0215.

[6] MDE's exceptional event demonstrations and EPA's concurrence are included in the docket for this rulemaking, available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0387.

[7] This data is included in the docket for this rulemaking available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0387.

[8] The Calcagni memorandum and Shapiro memorandum are included in the docket for this rulemaking available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0387.

Louis/East St. Louis area to attainment of the 1-hour ozone NAAQS).

EPA has determined that, in accordance with section 107(d)(3)(E)(v), the District has met all SIP requirements under section 110 of the CAA and part D of Title I of the CAA applicable for purposes of the redesignation of the District's portion of the Washington Area. In addition, EPA has determined that, in accordance with CAA section 107(d)(3)(E)(ii), the District's SIP is fully approved with respect to all requirements applicable for purposes of this redesignation. In making these determinations, EPA ascertained what requirements are applicable to the Area and determined that the portions of the District's SIP meeting these requirements are fully approved under section 110(k) of the CAA. We note that SIPs must be fully approved only with respect to applicable requirements. EPA's rationale is discussed in more detail in the following sections.

1. The District Has Met All Applicable Requirements of Section 110 and Part D of the CAA Applicable to the Washington Area for Purposes of Redesignation

a. Section 110 General Requirements for SIPs

Pursuant to CAA section 110(a)(1), whenever new or revised NAAQS are promulgated, the CAA requires states to submit a plan (*i.e.* ''SIP'') for the implementation, maintenance, and enforcement of such NAAQS. Section 110(a)(2) of Title I of the CAA contains the general requirements for a SIP, also referred to as ''infrastructure'' requirements. The infrastructure requirements of section 110(a)(2), include, but are not limited to, the following: (1) Submit a SIP that has been adopted by the state after reasonable public notice and hearing; (2) include enforceable emission limitations and other control measures, means, or techniques necessary to meet the requirements of the CAA; (3) provide for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; (4) provide for implementation of a source permit program to regulate the modification and construction of stationary sources within the areas covered by the plan; (5) include provisions for the implementation of part C prevention of significant deterioration (PSD) and part D nonattainment new source review (referred to as ''part D NNSR,'' ''NNSR,'' or ''nonattainment NSR'') permit programs; (6) include provisions for stationary source emission control measures, monitoring, and reporting; (7) include provisions for air quality modeling; and, (8) provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address transport of air pollutants, in accordance with the NO_X SIP Call,[9] amendments to the NO_X SIP Call, May 14, 1999 (64 FR 26298), and March 2, 2000 (65 FR 11222), and the Cross-State Air Pollution Rule (CSAPR) Update, October 26, 2016 (81 FR 74504). However, the section 110(a)(2)(D) SIP requirements are not linked with a particular area's ozone designation and classification. The section 110(a)(2)(D) requirements, where applicable, continue to apply to a state regardless of the designation (or redesignation) of any particular area within the state. EPA concludes that the SIP requirements linked with an area's ozone designation and classification are the relevant measures to evaluate when reviewing a redesignation request for the area. Thus, the requirements of section 110(a)(2)(D) of the CAA are not applicable requirements for purposes of redesignation. *See* 65 FR 37890 (June 15, 2000), 66 FR 50399 (October 19, 2001), and 68 FR 25418, 25426–25427 (May 13, 2003).

Similarly, other section 110 elements that are neither connected with attainment plan submissions nor linked with an area's ozone attainment status are not applicable requirements for purposes of redesignation. An area that is redesignated from nonattainment to attainment will remain subject to these statewide requirements after the area is redesignated to attainment of the 2008 ozone NAAQS. The section 110(a)(2) requirements that are linked to the area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The section 110(a)(2) elements not linked to the area's nonattainment status are not applicable for purposes of redesignation. This approach is consistent with EPA's existing policy on applicability (*e.g.,* for redesignations) of conformity and oxygenated fuels requirements, as well as with section 184 ozone transport region (OTR) requirements. *See, e.g.,* Reading, Pennsylvania, proposed and final rulemakings for redesignation, 61 FR 53174–53176 (October 10, 1996) and 62 FR 24826 (May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking for redesignation, 61 FR 20458 (May 7, 1996); and Tampa, Florida final rulemaking for redesignation, 60 FR 62748 (December 7, 1995). For further information and analysis, see the discussion of this issue in the Cincinnati, Ohio ozone redesignation (65 FR 37890, June 19, 2000), and the Pittsburgh, Pennsylvania ozone redesignation (66 FR 50399, October 19, 2001).

EPA has reviewed the District's SIP and concludes that it meets the general SIP requirements under section 110 of the CAA, to the extent those requirements are applicable for purposes of redesignation. On April 13, 2015 and August 31, 2018, EPA approved elements of the District's SIP submittal addressing the section 110(a)(2) requirements for the 2008 ozone NAAQS. *See* 80 FR 19538 (April 13, 2015) and 83 FR 44498 (August 31, 2018).[10] As explained previously, the general requirements of section 110(a)(2) are statewide requirements that are not linked to the 2008 8-hour ozone nonattainment status of the Washington Area and are therefore not ''applicable requirements'' for purpose of the review of the District's 2008 ozone NAAQS redesignation request.

[9] On October 27, 1998 (63 FR 57356), EPA finalized the ''Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone'' –commonly called the NO_X SIP Call. The NO_X SIP call requires the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. EPA developed the NO_X Budget Trading Program, an allowance trading program that states could adopt to meet their obligations under the NO_X SIP Call. The NO_X Budget Trading Program allowed electric generating units (EGUs) greater than 25 megawatts and industrial non-electric generating units, such as boilers and turbines, with a rated heat input greater than 250 million British thermal units per hour (MMBtu/hr), referred to as ''large non-EGUs'', to participate in a regional NO_X cap and trade program. The NO_X SIP call also established reduction requirements for other non-EGUs, including cement kilns and stationary internal combustion (IC) engines.

[10] EPA's April 13, 2015 final rule approved the District's infrastructure SIP submittal as satisfying all requirements of CAA section 110(a)(2) for the 2008 ozone NAAQS, except for the requirements under CAA section 110(a)(2)(D)(i)(I) and the PSD-related portions of section 110(a)(2)(C), (D)(i)(II), (D)(ii), and (J). *See* 80 FR 19538. In that final rule, EPA did not take rulemaking action on the portion of the District's infrastructure SIP submittal related to PSD, however, EPA notes that the District is subject to a Federal implementation plan (FIP) which incorporates the Federal PSD permitting requirements of 40 CFR 52.21 into the District's SIP. *See* 40 CFR 52.499. EPA's August 31, 2018 final rule approved the District's infrastructure SIP submittal as satisfying the requirement of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. *See* 83 FR 44498.

Because the District's SIP satisfies all of the general SIP elements and requirements set forth in CAA section 110(a)(2) applicable to and necessary for redesignation, EPA concludes that the District has satisfied the criterion of section 107(d)(3)(E)(v) regarding section 110 of the CAA.

b. Part D Requirements

Areas designated nonattainment for the ozone NAAQS are subject to the applicable nonattainment area and ozone-specific planning requirements of part D of the CAA. Section 172–176 of the CAA, found in subpart 1 of part D, set forth the basic nonattainment requirements for all nonattainment areas. Section 172(c), under part D of the CAA, sets forth the basic requirements of air quality plans for states with nonattainment areas for all pollutants that are required to submit plans pursuant to section 172(b). Section 182 of the CAA, found in subpart 2 of part D, establishes specific requirements for ozone nonattainment areas depending on the areas' nonattainment classifications.[11] The Washington Area was classified as marginal under subpart 2 of part D of the CAA for the 2008 ozone NAAQS. As such, the Area is subject to the subpart 1 requirements contained in CAA sections 172(c) and 176. The Area is also subject to the subpart 2 requirements contained in CAA section 182(a) (marginal nonattainment area requirements), which include, but are not limited to, submitting a baseline emissions inventory, adopting a SIP requiring emissions statements from stationary sources, and implementing a NNSR program for the relevant ozone standard. A thorough discussion of the requirements contained in CAA section 172(c) and 182 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Additionally, states located in the OTR, which includes the District,[12] are also subject to the requirements of CAA section 184. All areas located in the OTR, both attainment and nonattainment, are subject to additional control requirements under section 184 for the purpose of reducing interstate transport of emissions that may contribute to downwind ozone nonattainment. The section 184 requirements include reasonable available control technology (RACT), NNSR, enhanced vehicle inspection and maintenance (I/M), and State II vapor recovery or a comparable measure relating to gasoline dispensing facilities.

EPA has interpreted the section 184 OTR requirements, including the NNSR program, as not being applicable for purposes of redesignation. The rationale for this is based on two considerations. First, the requirement to submit SIP revisions for the section 184 requirements continues to apply to areas in the OTR even after redesignation to attainment. Therefore, states remain obligated to have NNSR, as well as RACT, and I/M programs, even after redesignation. Second, the section 184 control measures are region-wide requirements and do not apply to the area by virtue of the area's designation and classification, and thus are properly considered not relevant to an action changing an area's designation. *See* 61 FR 53174, 53175–53176 (October 10, 1996) and 62 FR 24826, 24830–24832 (May 7, 1997).

i. CAA Section 172 Requirements

CAA section 172(c) contains general requirements for nonattainment plans. As stated previously, a thorough discussion of these requirements may be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992). As provided in CAA part D, subpart 2, for marginal ozone nonattainment areas such as the Washington Area, the ozone specific requirements of section 182(a) supersede (where overlapping) the attainment planning requirements that would otherwise apply under section 172(c).

Upon determination by EPA that the Washington Area attained the 2008 ozone NAAQS, the requirements of CAA section 172(c) for the District to submit for their portion of the Washington Area an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures for failure to attain or make reasonable progress, and other planning SIPs related to attainment of the 2008 ozone NAAQS were suspended. *See* 40 CFR 51.1118. Once the Area is redesignated to attainment for the 2008 ozone NAAQS, these requirements no longer apply for the 2008 ozone NAAQS unless EPA determines that the Area has violated the 2008 ozone NAAQS, at which time such plans are required to be submitted. As stated previously, on November 14, 2017 (82 FR 52651), EPA determined that the Washington Area had attained the 2008 ozone NAAQS by the July 20, 2016 attainment date. Furthermore, as explained in section III.A of this action, the Washington Area continues to attain the 2008 ozone NAAQS. Therefore, because the Washington Area has attained the 2008 ozone NAAQS and the Area continues to attain the standard, no additional measures are needed to provide for attainment and the requirements of section 172(c)(1), 172(c)(2), 172(c)(6), and 172(c)(9) are not considered to be applicable for purposes of redesignation of the Washington Area for the 2008 ozone NAAQS.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions from all sources of the relevant pollutant or pollutants in the area. This requirement was not suspended by EPA's determination of attainment for the Washington Area and is superseded by the inventory requirement in section 182(a)(1) discussed later in this notice.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a NNSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without NNSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' The District lacks a SIP-approved PSD program; however, it is subject to a FIP which incorporates EPA's PSD permitting requirements of 40 CFR 52.21. *See* 40 CFR 52.499.

In addition, as explained previously, the Washington Area is included in the

[11] Ozone nonattainment areas are classified based on the severity of their ozone levels (as determined based on the area's ''design value,'' which represents air quality in the area for the most recent 3 years). The possible classifications for ozone nonattainment areas are Marginal, Moderate, Serious, Severe, and Extreme. *See* CAA section 181(a)(1).

[12] The OTR is comprised of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and the Consolidated Metropolitan Statistical Area, which includes the District of Columbia and portions of Virginia. The areas designated as in the Virginia portion of the OTR are as follows: Arlington County, Fairfax County, Loudoun County, Prince William County, Stafford County, Alexandria City, Fairfax City, Falls Church City, Manassas City, and Manassas Park City. *See, e.g.* ''Approval and Promulgation of Air Quality Implementation Plans; Virginia; NSR in the Ozone Transport Region'', 71 FR 39570 (July 13, 2006) and 71 FR 890 (January 6, 2006).

OTR established by Congress in section 184 of the CAA. Therefore, sources located in the District will remain subject to the part D NNSR requirements even after the Washington Area is redesignated to attainment. Since the part D NNSR requirements apply to the Washington Area regardless of its attainment status, the part D NNSR requirements are not considered to be relevant for purposes of the redesignation of the Washington Area. Regardless, the District has an approved part D NNSR program.[13] *See* 62 FR 40937 (July 31, 1977).

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted previously, the District's SIP meets the applicable requirements of section 110(a)(2) for purposes of redesignation.

ii. CAA Section 176 Conformity Requirements

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability that EPA promulgated pursuant to its authority under the CAA.

EPA interprets the conformity SIP requirements[14] as not applicable for purposes of evaluating a redesignation request under section 107(d) because state conformity rules are still required after redesignation and Federal conformity rules apply where state conformity rules have not been approved. *See Wall* v. *EPA,* 265 F .3d 426 (6th Cir. 2001) (upholding this interpretation); *see also* 60 FR 62748 (December 7, 1995) (redesignation of Tampa, Florida).

iii. Section 182 Requirements

Section 182(a)(1) requires states to submit a comprehensive, accurate, and current inventory of actual emissions from sources of NO_X and VOC emitted within the boundaries of the ozone nonattainment area. On July 17, 2014, the District and Virginia submitted a joint 2011 base year emissions inventory addressing NO_X and VOC emissions, as well as carbon monoxide (CO) emissions, for the Washington Area. On August 4, 2014, Maryland submitted its 2011 base year emissions inventory for the Washington Area, which also addressed NO_X, VOC, and CO. EPA approved the District's, Maryland's, and Virginia's base year emissions inventories for NO_X and VOC for the 2008 ozone NAAQS on May 13, 2015 (80 FR 27255). On July 23, 2015 (80 FR 43625), EPA approved the District's, Maryland's, and Virginia's base year emission inventories for CO.

Under section 182(a)(2)(A), states with ozone nonattainment areas that were designated prior to the enactment of the 1990 CAA amendments were required to submit, within six months of classification, all rules and corrections to existing RACT rules that were required under section 172(b)(3) prior to the 1990 CAA amendments. EPA approved the District's SIP revision satisfying the section 182(a)(2) RACT ''fix-up'' requirement on October 27, 1999 (64 FR 57777).

Section 182(c)(3) of the CAA requires areas classified as serious and above to adopt and implement an enhanced I/M program. The Washington Area was classified as severe for the 1979 1-hour ozone NAAQS, and therefore enhanced I/M was required. In addition, section 184(b)(1)(a) of the CAA requires areas located in the OTR that are a metropolitan statistical area, or part thereof, with a population of 100,00 or more to meet the enhanced I/M program requirements of CAA section 182(c)(3). EPA approved the District's enhanced I/M program into the District's SIP on June 11, 1999 (64 FR 31498).

CAA section 182(a)(2)(C) and section 182(a)(4) contain source permitting and offset requirements (NNSR). As discussed previously, the part D NNSR requirements will continue to apply to the Washington Area, regardless of attainment status, due to the Washington Area being part of the OTR. Therefore, EPA concludes that the District need not have a fully approved part D NSR program for purposes of this redesignation request. As stated previously, however, the District has an approved NNSR program. *See* 62 FR 40937 (July 31, 1997).

Section 182(a)(3) requires states to submit periodic emission inventories and a revision to the SIP to require owners or operators of stationary sources to annually submit emission statements documenting actual NO_X and VOC emissions. The District submits periodic emission inventories as required by CAA section 182(a)(3). As stated above, EPA approved the District's, Maryland's, and Virginia's base year emissions inventories for NO_X and VOC for the 2008 ozone NAAQS on May 13, 2015 (80 FR 27255). With regard to the stationary source emissions statements requirement of CAA section 182(a)(3)(B), EPA approved the District's emissions statements rule into the District's SIP on May 26, 1995 *(*60 FR 27944). The District's emissions statements rule requires that certain sources in the District report annual NO_X and VOC emissions and satisfies the requirements of CAA section 182(a)(3)(B). On May 25, 2018, the District submitted, as a formal revision to its SIP, a statement certifying that the District's existing emissions statements rule covers the District's portion of the Washington Area and satisfies the requirements of CAA section 182(a)(3)(B) for the 2008 ozone NAAQS. EPA proposed approval of the District's emissions statements certification for the 2008 ozone NAAQS (finding that the District's existing SIP-approved emissions statements rule satisfies the CAA section 182(a)(3) requirements for the 2008 ozone NAAQS) on March 5, 2019 (84 FR 7858).[15]

The District has satisfied all applicable SIP requirements under section 110 and part D of title I of the CAA for purposes of redesignation of the District for the 2008 ozone NAAQS. Therefore, EPA has determined that the District satisfies the requirements of CAA section 107(d)(3)(E)(v) for redesignation of the District's portion of the Washington Area.

2. The District Has a Fully Approved SIP for Purposes of Redesignation Under Section 110(k) of the CAA

At various times, the District has adopted and submitted, and EPA has approved, provisions addressing the

[13] On May 23, 2018 the District submitted a SIP revision certifying that the District's SIP-approved NNSR program, established in Chapters 1 (*Air Quality—General Rules*) and 2 (*Air Quality—General and Nonattainment Area Permits*) in Title 20 of the District of Columbia Municipal Regulations (DCMR), is at least as stringent as the Federal NNSR requirements for the Washington Area for the 2008 ozone NAAQS. *See* 40 CFR 51.165. EPA proposed approval of the District's NNSR program certification for the 2008 ozone NAAQS on March 19, 2019. 84 FR 9995.

[14] CAA section 176(c)(4)(E) requires states to submit revisions to their SIPs to reflect certain Federal criteria and procedures for determining transportation conformity. Transportation conformity SIPs are different from SIPs requiring the development of Motor Vehicle Emission Budgets (MVEBs), such as control strategy SIPs and maintenance plans.

[15] While not prejudging the outcome of EPA's rulemaking on the District's May 25, 2018 emissions statements certification for the 2008 ozone NAAQS, EPA expects to finalize rulemaking on that SIP revision before taking final action on this redesignation action.

various SIP elements applicable for the ozone NAAQS. As discussed previously, EPA has approved the District's SIP for the 2008 ozone NAAQS under section 110(k) for all requirements applicable for purposes of redesignation of the Washington Area.[16] EPA may rely on prior SIP approvals in approving a redesignation request (*see* the Calcagni memorandum at page 3; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426), plus any additional measures it may approve in conjunction with a redesignation action (*see* 68 FR 25426 (May 12, 2003) and citations therein).

Therefore, EPA has determined that the District's SIP is fully approved with respect to all requirements applicable for purposes of redesignation in accordance with CAA section 107(d)(3)(E)(ii).

C. Are the air quality improvements in the Washington Area due to permanent and enforceable emission reductions?

To redesignate an area from nonattainment to attainment, section 107(d)(3)(E)(iii) of the CAA requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from the implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable emission reductions. The District has demonstrated that the observed ozone air quality improvement in the Washington Area is due to permanent and enforceable reductions in NO_X and VOC emissions resulting from measures approved as part of the District's SIP as well as Federal measures.

In making this demonstration, the District has calculated the change in emissions between 2011 and 2014. The change in emissions is shown in Table 2. The District attributes the decrease in emissions and corresponding improvement in air quality during this time period to a number of regulatory measures that have been implemented in the Washington Area and upwind areas in recent years. Based on the information summarized in the following sections, the District has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions pursuant to CAA section 107(d)(3)(E)(iii).

[16] *See* Footnote 8.

1. Permanent and Enforceable Emission Controls Implemented

a. Federal Emission Control Measures

A variety of Federal and state control programs have contributed to reduced on-road, point source, and nonroad emissions of NO_X and VOC in the Washington Area, with additional emission reductions expected to occur in the future as older equipment and vehicles are replaced with newer, compliant models. Federal emission control measures include the following:

Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements

On February 10, 2000 (65 FR 6698), EPA promulgated Tier 2 motor vehicle emission standards and gasoline sulfur control requirements. These emission control requirements result in lower NO_X and VOC emissions from new cars and light duty trucks, including sport utility vehicles. With respect to fuels, this rule required refiners and importers of gasoline to meet lower standards for sulfur in gasoline, which were phased in between 2004 and 2006. By 2006, refiners were required to meet a 30 ppm average sulfur level, with a maximum cap of 80 ppm. This reduction in fuel sulfur content ensures the effectiveness of low emission-control technologies. The Tier 2 tailpipe standards established in this rule were phased in for new vehicles between 2004 and 2009. EPA estimated in the final rule that this program will reduce annual NO_X emissions by about 2.2 million tons per year in 2020 and 2.8 million tons per year in 2030 after the program is fully implemented and non-compliant vehicles have all been retired.

Control of Emissions From Nonroad Spark-Ignition Engines and Equipment

On October 8, 2008 (73 FR 59034), EPA finalized emission standards for new nonroad spark-ignition engines. The exhaust emission standards applied beginning in 2010 for new marine spark-ignition engines and in 2011 and 2012 for different sizes of new land-based, spark-ignition engines at or below 19 kW (*i.e.* small engines used primarily in lawn and garden applications). In the October 8, 2008 final rule, EPA estimated that by 2030 the rule will result in annual nationwide reductions of 604,000 tons of volatile organic hydrocarbon emissions, 132,200 tons of NO_X emissions, and 5,500 tons of directly-emitted $PM_{2.5}$ emissions. These reductions correspond to significant reductions in the formation of ground-level ozone.

Nonroad Diesel Engines Tier 1 and Tier 2

On June 17, 1994 (59 FR 31306), EPA made an affirmative determination under section 213(a)(2) of the CAA that nonroad engines are significant contributors to ambient ozone or CO levels in more than one nonattainment area. In the same notice, EPA also made a determination under CAA section 213(a)(4) that other emissions from compression-ignition (CI) nonroad engines rated at or above 37 kilowatts (kW) cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. In the June 17, 1994 final rule, EPA set a first phase of emission standards (Tier 1 standards) for nonroad diesel engines rated 37 kW and above. These standards apply to nonroad, compression-ignition (*i.e.* diesel-powered) utility engines including, but not limited to, farm, construction, and industrial equipment, rated at or above 37 kW. On October 23, 1998 (63 FR 56968), EPA finalized a second phase of emission standards (Tier 2 standards) for nonroad diesel engines rated under 37 kW. These emission standards have resulted in a decrease in NO_X emissions from the combustion of diesel fuel used to power this equipment. The Tier 1 and Tier 2 standards for nonroad diesel engines will continue to result in emission reductions as older equipment is replaced with newer, compliant models.

Emissions Standards for Large Spark Ignition Engines

On November 8, 2002 (67 FR 68242), EPA established emission standards for large spark-ignition engines such as those used in forklifts and airport ground-service equipment; recreational vehicles using spark-ignition engines such as off-highway motorcycles, all-terrain vehicles, and snow mobiles; and recreational marine diesel engines. These emission standards were phased in from model year 2004 through 2012. When the emission standards are fully implemented in 2030, EPA expects a national 75 percent reduction in hydrocarbon (HC) emissions, 82 percent reduction in NO_X emissions, 61 percent reduction in CO emissions, and a 60 percent reduction in direct particulate matter (PM) emissions from these engines, equipment, and vehicles compared to projected emissions if the standards were not implemented.

Standards for Reformulated and Conventional Gasoline

On February 16, 1994 (59 FR 7716), EPA finalized regulations requiring that gasoline in certain areas be reformulated

to reduce vehicle emissions of toxic and ozone-forming compounds, including NO_X and VOC. Reformulated gasoline (RFG) is required in the Washington Area. The first phase of the RFG program (Phase I) began in 1995 and the second phase (Phase II) began in 2000. These standards affect various gasoline-powered non-road mobile sources, such as lawn equipment, generators, and compressors. EPA estimates that Phase I of the RFG program resulted in a 2 percent and 17 percent annual reduction in NO_X, and VOCs, respectively, from 1995 emission levels and prevented 64,000 tons of smog-forming pollutants, including NO_X and VOC, from being emitted into the air from 1995 to 2000. Phase II of the RFG program, which began in 2000, was expected to reduce emissions of NO_X and VOC by 7 percent and 27 percent, respectively, from 1995 emission levels and reduce emissions of smog-forming pollutants by an additional 41,000 tons.[17] The RFG program continues to provide emission reductions in the Washington Area as the use of RFG results in less vehicle emissions of NO_X and VOC compared to the use of conventional gasoline.

Emission Standards for Locomotives and Locomotive Engines

On April 16, 1998 (63 FR 18978), EPA established emission standards for NO_X, HC, CO, PM, and smoke from newly manufactured and remanufactured diesel-powered locomotives and locomotive engines. These emission standards were effective in 2000 and are expected to result in a more than 60 percent reduction in NO_X emissions from locomotives by 2040 compared to 1995 baseline levels.

b. Control Measures Specific to the Washington Area

Maryland Healthy Air Act

In addition to the measures referenced previously, a reduction of emission of ozone precursors can also be attributed to the Maryland Healthy Air Act (Annotated Code of Maryland Environment Title 2 Ambient Air Quality Control Subtitle 10 Healthy Air Act Sections 2–1001 to 2–1005, with implementing regulations at COMAR 26.11.27 Emission Limitations for Power Plants). The Maryland Health Air Act (HAA) was effective on July 16, 2007 and approved by EPA on September 4, 2008 (73 FR 51599). The HAA established limits on the amount of NO_X and SO_2 emissions affected facilities in Maryland could emit and required the installation of on-site pollution controls at 15 power plants in Maryland. The first phase of the HAA occurred between 2009 and 2010 and reduced NO_X emissions from affected sources by almost 70% compared to 2002 levels. The second phase of the HAA occurred between 2012 and 2013. Maryland estimates that the HAA will reduce NO_X emissions by approximately 75% from 2002 levels.

Closure of GenOn Potomac River LLC Facility

The decrease in emissions of ozone precursors is also attributable to the closure of the GenOn Potomac River plant located in Alexandria, Virginia. This 482-megawatt electrical generating facility consisted of five coal-fired boilers and emitted 557.7 tons of NO_X annually and 2.7 tons of NO_X per ozone season day (tpd) in 2011. The plant ceased operations and signed a mutual determination letter on December 21, 2012, agreeing to the permanent shutdown of the source and revoking all permits for the facility.[18] Therefore, this closure is permanent and Federally enforceable.

2. Emission Reductions

The District calculated the change in emissions between 2011 and 2014 throughout the entire Washington Area to demonstrate that air quality has improved. The change in emissions is shown in Table 2. The District used the 2011 base year emissions inventory for the Washington Area as the nonattainment year inventory because 2011 was one of the three years used to designate the area nonattainment for the 2008 ozone NAAQS. EPA approved the Washington Area 2011 base year inventory as meeting the requirements of CAA section 182(a)(1) on May 13, 2015 (80 FR 27276) for NO_X and VOC emissions and July 23, 2015 (80 FR 43625) for CO emissions. As explained in EPA's August 8, 2018 (83 FR 39019) NPRM, 2014 was used as the attainment year inventory in the maintenance plan for the Washington Area.

TABLE 2—2011–2014 EMISSIONS REDUCTION FOR THE WASHINGTON, DC-MD-VA AREA

2011	2014	Δ 2011–2014	Percent reduction from 2011
VOC Emissions (tpd)			
295.0	259.4	35.6	12.1
NO_X Emissions (tpd)			
436.5	296.9	139.6	32.0
CO Emissions (tpd)			
1,800.8	1,617.9	182.9	10.2

Note: 2011 emissions data is from the 2011 base year emissions inventory for the Washington, DC–MD–VA 2008 ozone NAAQS nonattainment area that was approved by EPA on May 13, 2015 (80 FR 27276) for NO_X and VOC emissions and July 23, 2015 (80 FR 43625) for CO emissions.

[17] *See https://www.epa.gov/gasoline-standards/reformulated-gasoline* for more information on the RFG program.

[18] *See* Mutual Determination Letter from Virginia Department of Environmental Quality to Mr. William Lee Davis, President, GenOn Potomac River, LLC, Subject: Mutual Determination of Permanent Shutdown of the Potomac River Generating Station, December 20, 2012 included in the docket for this rulemaking available online at *https://www.regulations.gov,* Docket ID: EPA–R03–OAR–2018–0387.

Table 2 shows that emissions of VOC and NO_X in the Washington area were reduced by 35.6 tpd and 139.6 tpd, respectively, between 2011 and 2014. As discussed previously, the District has identified several Federal rules that resulted in the reduction of NO_X and VOC emissions from 2011 to 2014. Therefore, the District has shown that the air quality improvements in the Washington Area are due to permanent and enforceable emission reductions.

D. Does the District have a fully approvable ozone maintenance plan for the Washington Area?

As one of the criteria for redesignation to attainment, section 107(d)(3)(E)(iv) of the CAA requires EPA to determine that the area has a fully approved maintenance plan pursuant to section 175A of the CAA. Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under CAA section 175A, the maintenance plan must demonstrate continued attainment of the NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan which demonstrates that attainment of the NAAQS will continue for an additional 10 years beyond the initial 10-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures, as EPA deems necessary, to assure prompt correction of the future NAAQS violation.

The Calcagni memorandum provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five elements: (1) An attainment emission inventory; (2) a maintenance demonstration; (3) a commitment for continued air quality monitoring; (4) a process for verification of continued attainment; and (5) a contingency plan.

In conjunction with their requests to redesignate their respective portions of the Washington Area to attainment of the 2008 ozone NAAQS, the District, Maryland, and Virginia submitted, as a revision to their SIPs, a plan to provide for maintenance of the 2008 ozone NAAQS through 2030, which is more than 10 years after the expected effective date of the redesignation to attainment of the Washington Area. On April 15, 2019, EPA approved the District, Maryland, and Virginia's maintenance plan for the Washington Area as a revision to the District's, Maryland's, and Virginia's SIPs. *See* 84 FR 15108. Therefore, EPA finds that the District has satisfied the maintenance plan requirement of CAA section 107(d)(3)(E)(iv) for redesignation of the Washington Area.

IV. Proposed Action

EPA is proposing to approve the District's March 12, 2018 request to redesignate to attainment the District's portion of the Washington Area. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

V. Statutory and Executive Order Reviews

Under the CAA, the redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, proposing approval of the District's March 12, 2018 redesignation request for the District's portion of the Washington Area, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 9, 2019.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2019–10466 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Parts 51–8

RIN 3037–AA10

Proposed Public Availability of Agency Materials

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed rule with request for comments.

SUMMARY: This document amends the Committee for Purchase From People Who Are Blind or Severely Disabled's (Committee) regulations in their entirety under the Freedom of Information Act (FOIA) to incorporate changes made to the FOIA by the FOIA Improvement Act of 2016. In addition, this document amends provisions in the fee section to reflect developments in the case law and to streamline the description of the factors to be considered when making fee waiver determinations.

DATES: *Comment Date:* Comments should be submitted on or before June 10, 2019 to be considered in the formulation of the final rule.

ADDRESSES: You may submit your comments, identified by ''RIN 3037–AA10'' by any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Comments received will be posted without change to *www.regulations.gov* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov* approximately two to three days after submission to verify posting (except allow for 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Timi Nickerson Kenealy, 703–603–2121.

SUPPLEMENTARY INFORMATION:

I. Background

The Committee's last rule amending its FOIA policies was published in the **Federal Register** on April 3, 1998, Volume 63, No. 64, pages 16439–16440.

The Freedom of Information Act (FOIA) at 5 U.S.C. 552, requires agencies to ''promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests [the FOIA] and establishing procedures and guidelines for determining when such fees should be waived or reduced.'' Additionally, an agency may, in its regulation, designate those components that can receive FOIA requests, provide for the aggregation of certain requests, and provide for multitrack processing of requests. Finally, the FOIA requires agencies to ''promulgate regulations . . . providing for expedited processing of requests for records.''

On June 30, 2016, the FOIA Improvement Act of 2016 (Act) was signed. The Act requires agencies to notify requesters for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services. It also requires that agencies

(i) make records that have been both released previously and requested three or more times available to the public in electronic format,

(ii) establish a minimum of ninety days for requesters to appeal an adverse determination, and

(iii) provide, or direct requesters to, dispute resolution services at various times throughout the FOIA process.

The FOIA Improvement Act also adds restrictions to when agencies can charge certain fees if they are not able to meet FOIA's time limits.

This document replaces and renumbers in its entirety the Committee's regulations in 41 CFR part 51–8 to reflect those statutory changes.

II. Changes Proposed by the Committee in This Rulemaking

This rule amends the Committee's regulations under the FOIA consistent with Department of Justice's Guidance for Agency FOIA Regulations issued September 8, 2016, and adopts both the format and suggested language of the accompanying Template for Agency FOIA Regulations. Revised provisions include the following:

§ 51–8.1 (General) that replaces 51–8.1 Purpose and 8.2 Scope,

§ 51–8.2 (Proactive disclosure of Committee records) (new), replaces 51–8.4 Availability of materials requiring agencies to make records available in electronic format rather than making them available for public inspection and copying,

§ 51–8.3 (Requirements for making requests, replaces old 51–8.5 Requests for records (old 8.3 Definitions is repealed (definitions are incorporated in each section where included)),

§ 51–8.4 (Responsibility for responding to requests), replaces old 51–8.4 Availability of materials (allowing for review of records at the agency's physical location—repealed) and 51–8.9 Records of other agencies now at 51–8.4(c)(2)

§ 51–8.5 (Timing of responses to requests), replaces old 51.8–7 Committee response to requests for records and 51–8.11 Extensions of time,

§ 51–8.6 (Response to requests), replaces old 51–8.6 Aggregating requests and 8.7 Committee response to requests for records,

§ 51–8.7 (Confidential commercial information), replaces old 51–8.8 Business information,

§ 51–8.8 (Administrative appeals) replaces 51–8.10 Appeals,

§ 51–8.9 (Preservation of records), replaces 51–8.16 Preservation of records,

§ 51–8.10 (Fees) replaces 51–8.7(f) notice of fees or to modify request and (g) notice requirements for fees, 8.12 Fee schedule, 8.13 Fees charged by category of requester, 8.14 Fee waivers and reductions, and 8.15 Collection of fees and charges, and

§ 51–8.11 (Other rights and services) (new).

Section 51–8.1 (General) is revised to delete the reference to the Department's policy regarding discretionary release of information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, because that foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 51–8.2 (Proactive disclosure of Department records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying.

As explained below, this document amends the provisions in 51–8.12 through 51–8.15 by incorporating all fee-related provisions provisions in § 51–8.10 (Fees) to incorporate the new statutory restrictions on charging fees in certain circumstances, to reflect developments in the case law, and to streamline the description of the factors to be considered when making fee waiver determinations. Paragraph (b) of § 51–8.10 (Fees) conforms to recent decisions of the D.C. Circuit Court of Appeals addressing two FOIA fee categories: ''representative of the news media'' and ''educational institution.'' See *Cause of Action* v. *FTC,* 799 F.3d 1108 (D.C. Cir. 2015); *Sack* v. *DOD,* 823 F.3d 687 (D.C. Cir. 2016). The Committee's existing FOIA regulations state that a representative of the news media is ''any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.'' *In Cause of Action,* 799 F.3d at 1125, the court held that a representative of the news media need not work for an entity that is ''organized and operated'' to publish or broadcast news. Therefore, the definition of ''representative of the news media'' is revised to remove the ''organized and operated'' requirement. The definition of ''educational institution'' is revised to reflect the holding in *Sack,* 823 F.3d at 688, that students who make FOIA requests in furtherance of their coursework or other school-sponsored activities may qualify under this requester category.

Paragraph (d)(2) of § 51–8.10, which addresses restrictions on charging fees

when the FOIA's time limits are not met, is revised to reflect changes made to those restrictions by the FOIA Improvement Act of 2016. Specifically, these changes reflect that agencies may not charge search fees (or duplication fees for representatives of the news media and educational/non-commercial scientific institution requesters) when the agency fails to comply with the FOIA's time limits. The restriction on charging fees is excused and the agency may charge fees as usual when it satisfies one of three exceptions detailed at 5 U.S.C. 552(a)(4)(A)(viii)(II).

Lastly, this rule revises paragraph (k) of § 51–8.10, which addresses the requirements for a waiver or reduction of fees, to specify that requesters may seek a waiver of fees and to streamline and simplify the description of the factors to be considered by components when making fee waiver determinations. These updates do not substantively change the analysis, but instead present the factors in a way that is clearer to both the Committee and requesters. Rather than six factors, the amended section provides for three overall factors. Specifically, a requester should be granted a fee waiver if the requested information (1) sheds light on the activities and operations of the government; (2) is likely to contribute significantly to public understanding of those operations and activities; and (3) is not primarily in the commercial interest of the requester. This streamlined description facilitates easier understanding and application of the statutory standard.

Section 51–8.1 (General) is revised to delete the reference to the Department's policy regarding discretionary release of information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, because that foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 51–8.2 (Proactive disclosure of Department records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying.

Additional information about the Committee's FOIA program—including how to submit a FOIA request to the Committee can be found at *https://www.abilityone.gov/laws,_regulations_and_policy/foia.html.*

III. Expected Impact of the Proposed Rule

The Committee actively works to make certain its FOIA system operates as efficiently as possible. The website provides explicit instructions for those who wish to submit a FOIA request. The Committee's requesters are a diverse community, including lawyers, industry professionals, reporters, and members of the public. Costs for these requestors can include the time required to research the current FOIA rule and the time and preparation required to respond to a request/appeal.

The Agency receives about an average of 15 FOIA requests per year. The majority of the FOIA requests, include request for information on the number of disabled personnel working on individual projects, hourly wages of personnel with disabilities working individual projects. These proposed revisions will make it easier to research and review the Committee's FOIA rule before submitting a request. Many of the measures discussed in Section II of this document should facilitate FOIA requests and production. Although the Committee is unable to quantify these savings, the Committee does believe it is deregulatory in nature in that it provides relief to requestors.

IV. Regulatory Procedures

Executive Order 12866—Regulatory Planning and Review and Executive Order 13563—Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This document is not a significant regulatory action, under E.O. 12866.

Executive Order 13771—Reducing Regulations and Controlling Regulatory Costs

This proposed rule is expected to be an E.O. 13771 deregulatory action. Details can be found in Section III—Expected Impact of the Proposed Rule.

Regulatory Flexibility Act

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

List of Subjects in 41 CFR Part 51–8

Administrative practice and procedure, Freedom of Information Act, Privacy Act.

For reasons set forth in the preamble, the Committee proposes to amend 41 CFR part 51–8 to read as follows:

PART 51–8—PUBLIC AVAILABILTY OF AGENCY MATERIALS

Sec.

Authority: 5 U.S.C. 552

PART 51–8—PUBLIC AVAILABILTY OF AGENCY MATERIALS

§ 51–8.1 General.

(a) This part contains the rules that the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) follows in processing requests for records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under part 51–9 as well as under this part. As a matter of policy, the Committee makes discretionary disclosures of records or information exempt from disclosure under the FOIA

whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(b) The Committee has a centralized system for processing requests, all requests are handled by the FOIA Officer.

§ 51–8.2 Proactive Disclosures.

Records that the Committee is required to make available for public inspection in an electronic format may be accessed through the Committee's public website: *www.abilityone.gov.* The Committee is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Committee shall ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. The Committee's FOIA Public Liaison contact information is available at *http://www.abilityone.gov/laws,_regulations_and_policy/foia.html.*

§ 51–8.3 Requirements for Making Requests.

(a) *General Information.*

(1) The Committee has designated a FOIA office to process and respond to all FOIA requests. All Committee departments have the capability to receive requests electronically either through email or a web portal. A request will receive the quickest possible response if it is addressed to the FOIA office. To make a request for records, a requester should write directly to the FOIA office.

(2) A requester may submit a request for records to the Executive Director at the Committee's offices, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202–3259, or via email to *FOIA@abilityone.gov,* or via facsimile to (703) 603–0655. The request must be in writing and should indicate that it is being made under the FOIA. Failure to submit a request in accordance with these procedures may delay the processing of the request.

(3) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in part 51–9.

(4) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual has deceased (*e.g.,* a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Committee can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe records sought in sufficient detail to enable Committee personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the FOIA office or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the FOIA office determines that it does not reasonably describe the records sought, the FOIA office shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA office or FOIA Public Liaison, each of whom is available to assist the requester in reasonably describing the records sought. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(c) If the Committee determines that a request does not reasonably describe the records, it shall inform the requester of this fact and extend to the requester an opportunity to clarify the request or to confer promptly with knowledgeable Committee personnel to attempt to identify the records being sought or to reformulate a request. The Committee may offer assistance in identifying records and reformulating a request where: the description is deemed insufficient, the production of voluminous records is required, or a considerable number of work hours would be required to complete the request that would interfere with the business of the Committee.

§ 51–8.4 Responsibility for Responding to Requests.

(a) *In general.* Except in the instances described in paragraphs (c) of this section, the Committee is responsible for responding to a record request it received. In determining which records are responsive to a request, the Committee ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Committee shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) is not considered responsive to a request. The Committee has no obligation to create a record solely for the purpose of making it available under the FOIA.

(b) *Authority to grant or deny requests.* The Executive Director, or designee, is authorized to grant or deny any request for records that are maintained by the Committee.

(c) *Consultation, referral, and coordination.* When reviewing records located by the Committee in response to a request, the Committee shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Committee shall proceed in one of the following ways:

(1) *Consultation.* When records originated with the Committee processing the request, but contain information of interest to another agency, or other Federal Government office, the Committee should typically consult with that other agency prior to making a release determination.

(2) *Referral.*

(i) When upon the receipt of the request the Committee determines that a different agency, or other Federal Government office is best able to determine whether to disclose the record, the Committee should refer the responsibility for responding to the request to the other agency, as long as that agency is subject to the FOIA. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the Committee processing the request and the originating agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Committee refers any part of the responsibility for responding to a request to another agency, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the

name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if the Committee responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publically known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Committee locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Committee, upon receipt of the request, should coordinate with the originating component or agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the Committee.

(d) *Classified information.* Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Committee shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever a component's record contains information that has been derivatively classified (*e.g.,* when it contains information classified by another agency), the Committee shall refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Committee will be handled according to the date that the FOIA request was received by the first agency.

(f) *Agreements regarding consultations and referrals.* The Committee may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 51–8.5 Timing of Responses to Requests.

(a) *In general.*

(1) The Committee ordinarily will respond to requests according to their order of receipt. The time limits prescribed in the FOIA will begin only after the Committee identifies a request as being made under the FOIA and deemed received by the Committee.

(2) An initial determination whether, and to what extent, to grant each request for records or a fee waiver shall be made within 10 business days after receipt of that request. The requester shall be notified as soon as the determination is made.

(3) When a requester complies with the procedures established in this part for obtaining records under the FOIA, the request shall receive prompt attention, and a response will be made within 20 business days.

(b) *Unusual circumstances.* Whenever the Committee cannot meet the statutory time limit for processing a request because of ''unusual circumstances,'' as defined in the FOIA, and the Committee extends the time limit on that basis, the Committee shall, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the Committee will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Committee shall make available its FOIA office and its FOIA Public Liaison for this purpose. The agency must also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

(c) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Committee may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The Committee shall not aggregate multiple requests that involve unrelated matters.

(d) *Multitrack processing.* (1) The Committee may use two or more processing tracks by distinguishing between simple, complex, and expedited requests based on the amount of work and/or time needed to process a request or the number of pages involved. Expedited processing shall be in accordance with the standards set forth in paragraph (g) of this section. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. The Committee shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(e) *Expedited processing.* (1) Requests and appeals may be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) through (iv) of this section must be submitted to the Committee's FOIA office.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of

administrative discretion, the Committee may waive the formal certification requirement.

(4) The Committee shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request will be given priority and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 51–8.6 Responses to Requests.

(a) *In general.* The Committee should, to the extent practicable, communicate with requesters having access to the internet using electronic means, such as email or web portal.

(b) *Acknowledgment of requests.* The Committee shall acknowledge the request and assign it an individualized tracking number if it will take longer than 10 working days to process. The Committee shall include in the acknowledgement a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Grants of requests.* When the Committee makes a determination to grant a request in full or in part, it shall notify the requester in writing. The Committee shall inform the requester of any fees charged under subpart 51–8.10 of this part and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The Committee must inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests.* If the Committee makes an adverse determination denying a request in any respect, the requester will be notified in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) *Content of denial.* The denial will be signed by the Executive Director or designee and include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under subpart 51–8.8 of this part, and a description of the appeal requirements set forth therein; and

(5) A statement notifying the requester of the assistance available from the Committee's FOIA Public Liaison and the dispute resolution services offered by Office of Government Information Services (OGIS).

§ 51–8.7 Confidential Commercial Information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the Committee from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Committee will promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the Committee determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Committee has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish notification.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Committee determines that the information is exempt under the FOIA;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous, except that, in such a case, the Committee shall give the submitter written notice of any final decision to disclose the information and shall provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.*

(1) The Committee will specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the Committee a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by

the Committee after the date of any disclosure decision shall not be considered by the Committee. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Committee will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.*

(1) Whenever the Committee decides to disclose information over the objection of a submitter, the Committee will provide the submitter written notice, which will include:

(i) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(ii) A description of the information to be disclosed; and

(iii) A specified disclosure date, which must be a reasonable time after the notice, and not less than 10 business days after the date of the notice submission.

(iv) A statement that the submitter must notify the Committee immediately if the submitter intends to seek injunctive relief.

(2) Notwithstanding paragraph (e)(2) of this section, even if the submitter fails to respond to Committee's notice specified in paragraph (c) of this section, whenever the Committee decides to disclose the commercial information, the Committee will provide the submitter written notice of disclosure, as specified in paragraph (g)(1) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Committee will promptly notify the submitter.

(i) *Requester notification.* The Committee will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 51–8.8 Administrative Appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the Committee's Chief FOIA Officer. The contact information for the FOIA Officer is available at the Committee's website, at *http://www.abilityone.gov/laws,_regulations_and_policy/foia.html.* Appeals can be submitted through email or the web portal accessible on the FOIA web page. Examples of adverse determinations are provided in § 51–8.6(d). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Committee's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.*

(1) The Committee Executive Director or designee will act on behalf of the Committee on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the Committee's Chief FOIA Officer shall take appropriate action to ensure compliance with

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds a Committee determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If a Committee's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The Committee will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the Committee agrees to participate in the mediation services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of a Committee's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 51–8.9 Preservation of Records.

The Committee will preserve all correspondence pertaining to the requests it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to Title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. Records will not be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 51–8.10 Fees.

(a) *In general.* The Committee will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, the Committee may contact a requester for additional information. The Committee shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Committee will ordinarily collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order payable to the United States Department of Treasury.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The Committee's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(2) *Direct costs* are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.,* the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the

requester's role at the educational institution. The Committee may seek assurance from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category.

Example 1. A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationary.

Example 3. A student who makes a request in furtherance of the student's coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (b)(1) of this section and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Committee shall also consider a requester's past publication record in making this determination.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 51–8.7 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Committee will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the Committee should not add any additional costs to charges calculated under this section.

(1) *Search.*

(i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The Committee will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Committee may properly charge for time spent searching even if responsive records are not located or if the Committee determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees shall be as follows: Professional—$10.00; and clerical/administrative—$4.75.

(iii) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by an agency at a Federal records center operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. The Committee shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the Committee in the form or format requested. Where photocopies are supplied, agencies will provide one copy per request at the cost of 25¢ per page. For copies of records produced on tapes, disks, or other media, the Committee will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall also pay the direct costs associated with scanning those materials. For other forms of duplication, agencies will charge the direct costs.

(3) *Review.* The Committee will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.,* the review conducted by the Committee to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the Committee's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.*

(1) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(2)(i) If the Committee fails to comply with the FOIA's time limits in which to respond to a request, it may not charge

search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Committee has determined that unusual circumstances, as defined by the FOIA, apply and the Committee provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the Committee has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Committee may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees if the following steps are taken. The Committee must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the Committee must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Committee may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, Committee shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.

(e) *Notice of anticipated fees in excess of $25.00.*

(1) When the Committee determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the requesting party will be notified of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless a written statement from the requester has been received indicating a willingness to pay fees as high as those anticipated. If only a portion of the fee can be readily estimated, the Committee shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and shall advise the requester whether those entitlements have been provided.

(2) If the Committee notifies the requester that the actual or estimated fees are in excess of $25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or, in the case of a noncommercial use, requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The Committee is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Committee estimates that the total fee will exceed that amount, the Committee will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Committee will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The Committee will make available the FOIA Public Liaison or other personnel to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Committee chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The Committee may charge interest on any unpaid bill for processing FOIA requests starting on the 31st day following the date of billing the requester. Interest rates will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Committee.

(h) *Aggregating requests.* When the Committee reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Committee may aggregate those requests and charge accordingly. The Committee may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Committee will aggregate them only where there is a reasonable basis for determining that aggregating the requests is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(i) *Advance payments.*

(1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the Committee shall not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.,* payment before copies are sent to a requester) is not an advance payment.

(2) When the Committee determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The Committee may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee within 30 calendar days of the billing date, the Committee may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Committee may require that the requester make an advance payment of the full amount of any anticipated fee before the Committee begins to process a new request or continues to process a pending request or any pending appeal. Where the Committee has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding

fees, it may require that the requester provide proof of identity.

(4) In cases in which the Committee requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Committee's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Committee shall inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.*

(1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The Committee will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (ii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about the Committee operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The Committee ordinarily will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Committee will consider the following criteria:

(A) The Committee must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or for profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Committee must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) through (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Committee ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) through (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Committee and should address the criteria referenced above. A requester may submit a fee waiver request at a later time as long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 51–8.11 Other Rights and Services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Patricia Briscoe,

Deputy Director, Business Operations, (Pricing and Information Management).

[FR Doc. 2019–08336 Filed 5–20–19; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648–BI59

Atlantic Highly Migratory Species; Amendment 14 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS); request for comments.

SUMMARY: NMFS announces the availability of the scoping document on Amendment 14 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) and its intent to prepare an EIS under the National Environmental Policy Act (NEPA Given revisions to the Magnuson-Stevens Fishery Conservation and Management Act National Standard 1 (NS1) guidelines, NMFS is exploring options related to the implementation of those new guidelines as they relate to annual catch limits (ACLs) for Atlantic sharks in the HMS management unit. In the scoping document, NMFS begins the process for re-examining how to establish these ACLs, including an examination of how to establish the acceptable biological catch (ABC) and account for uncertainty arising from the stock assessment and the impacts to the management measures. NMFS expects to consider the comments received on the scoping document for developing Amendment 14 to the 2006 Consolidated HMS FMP. NMFS will announce the date and times for the scoping meetings in a separate **Federal Register** notice at a later date.

DATES: Topics included in this NOI will be discussed at the HMS Advisory Panel, May 21–23, 2019. Additional

scoping meetings and a conference call will be announced in a subsequent notice in the **Federal Register**. Please see the **SUPPLEMENTARY INFORMATION** section of this NOI for more specifics regarding the HMS Advisory Panel meeting. NMFS requests receipt of any comments on the scoping document by July 31, 2019.

ADDRESSES: The presentation at the HMS Advisory Panel will be held at the Sheraton, 8777 Georgia Avenue, Silver Spring, MD 20910. You may submit comments on the scoping document, identified by NOAA–NMFS–2019–0040, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2019-0040,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Peter Cooper, NMFS/SF1, 1315 East-West Highway, National Marine Fisheries Service, SSMC3, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and generally will be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

The Scoping Document on Amendment 14 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan and supporting documents are available from the HMS Management Division website at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species,* or contact Ian Miller by phone at 301–427–8503 for hard copies.

FOR FURTHER INFORMATION CONTACT: Ian Miller or Karyl Brewster-Geisz at 301–427–8503.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires that any FMP or FMP amendment be consistent with ten National Standards. Specifically, NS1 requires that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. In 2016, NMFS revised the NS1 guidelines to improve and streamline them, enhance their utility for managers and the public, and to facilitate compliance with the requirements of the Magnuson-Stevens Act and provide management flexibility in doing so.

The revisions address a range of issues, including providing guidance on phasing in changes to catch limits and carrying over unused quota from one year to the next (81 FR 71858; October 18, 2016). With the changes in the NS1 guidelines and given that NMFS is seeking additional management flexibility in establishment of shark reference points, NMFS is exploring options related to the implementation of those new provisions as it relates to shark ACLs.

Shark stock assessments conducted by the SouthEast Data, Assessment, and Review (SEDAR) process and conducted by the science branch of the International Commission for the Conservation of Atlantic Tunas (ICCAT). Species are assessed individually to the extent possible, with matching TACs. In some cases, the available data are not sufficient for estimating a TAC for use in management (*e.g.,* dusky shark). Also, in some cases, TACs for individual species may be aggregated into species complexes for management purposes (*e.g.,* pelagic shark complex, large coastal shark complex, etc.).

Since Amendment 3 to the 2006 Consolidated Atlantic HMS FMP, NMFS has set the acceptable biological catch (ABC), overfishing limit (OFL), and overall ACL for these stocks equal to the TAC. NMFS has used this ABC to calculate the shark sector ACLs and commercial quotas for the fishery. In the NS1 guidelines, NMFS defines the ABC as a level of a stock or stock complex's annual catch, which is based on an ABC control rule that accounts for the scientific uncertainty in the estimate of OFL, any other scientific uncertainty, and the Council's risk policy (see 50 CFR 600.310(f)(1)(ii)). NMFS defines ACL as a limit on the total annual catch of a stock or stock complex, which cannot exceed the ABC, which serves as the basis for invoking AMs. An ACL may be divided into sector-ACLs (see 50 CFR 600.310(f)(1)(iii)). For the prohibited shark complex, where commercial and recreational retention and landings are not allowed, NMFS has, consistent with NS1 guideline provisions, set the ACL equal to zero, although a small amount of bycatch occurs during other fishing operations.

In the scoping document, NMFS begins the process for re-examining how to establish the ACLs for shark species that are in the HMS management unit based on the 2016 final rule updating the NS1 guidelines (81 FR 71858, October 18, 2016), and examines how to establish the ABC and account for uncertainty arising from the stock assessment and the impacts to the management measures. Additionally, this document discusses how to establish ACLs in the absence of a full stock assessment and considers changes to quota carry-over provisions. The HMS shark regulations govern conservation and management of sharks in the management unit, under the authority of the Magnuson-Stevens Act. For sharks, the ''management unit'' means all fish of the species listed in Table 1 of Appendix A to 50 CFR part 635, in the western north Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea. For some shark stocks caught in association with ICCAT fisheries, ICCAT adopts conservation and management measures, and NMFS implements them consistent with ATCA. NMFS welcomes comments on the appropriate scope of the action as it relates to the species with management measures under ICCAT.

NMFS has several ongoing actions affecting HMS management that are, or soon will be, available for public comment. While each of these actions are separate, they are related in some ways, and the comment periods may overlap. Depending on the outcomes, one action could have impacts on other actions. The following summarizes these other actions for the regulated community's information and background.

NMFS recently released its ''Draft Three-Year Review of the Individual Bluefin Quota (IBQ) Program.'' The IBQ Program, adopted in Amendment 7 to the 2006 Consolidated HMS FMP (Amendment 7), is a catch share program that introduced individual vessel accountability for bluefin bycatch in the pelagic longline fishery. Formal reviews of such catch share programs are required to evaluate whether their objectives are met. In Amendment 7, NMFS proposed and finalized a plan to formally evaluate the success and performance of the IBQ Program after three years of operation and to provide the HMS Advisory Panel with a publicly-available written document with its findings.

NMFS also recently released a document (Amendment 13 Issues and Options Paper) for use in 2019 for

scoping, a public process during which NMFS will consider a range of issues and objectives, as well as possible options for bluefin tuna management. The options being presented in the Issues and Options Paper consider the preliminary results of the Draft Three-Year Review and respond to recent changes in the bluefin fishery and input from the public and HMS Advisory Panel. The options include refining the IBQ Program; reassessing allocation of bluefin tuna quotas (including the potential elimination or phasing out of the Purse Seine category); and other regulatory provisions regarding bluefin directed fisheries and bycatch in the pelagic longline fishery, to determine if existing measures are the best means of achieving current management objectives for bluefin tuna management. During scoping, public feedback will be accepted via written comments or scoping meetings as described in separate **Federal Register** notices.

NMFS also is currently in the process of developing a Proposed Rule to Modify Pelagic Longline Bluefin Tuna Area-Based and Weak Hook Management Measures. To analyze the potential environmental effects of a range of alternatives, NMFS recently released a Draft Environmental Impact Statement (DEIS). The DEIS evaluates whether current area-based and gear management measures remain necessary to reduce and/or maintain low numbers of bluefin tuna discards and interactions in the pelagic longline fishery, given more recent management measures, including the IBQ Program. The DEIS prefers alternatives that undertake a process to evaluate the need for the Northeastern United States Closed Area and the Gulf of Mexico Gear Restricted Area; removes the Cape Hatteras Gear Restricted Area; and adjusts the Gulf of Mexico weak hook effective period from year-round to seasonal (January–June). The comment period for the DEIS and proposed rule are open through July 31, 2019. NMFS is holding four public hearings across the Gulf of Mexico and Atlantic Coast. There will also be two webinars that will serve as public hearings for interested members of the public from all geographic locations. After consideration of public comments, NMFS expects to finalize the rule in the late fall of 2019. The proposed rule related to this DEIS is expected to be released shortly.

Finally, NMFS also released an Issues and Options Paper considering approaches to collect data and perform research in areas that are currently closed to certain gears or fishing activities for Atlantic HMS. Such research will help evaluate and support spatial fisheries management for Atlantic HMS. ''Spatial management'' refers to a suite of fisheries conservation and management measures that are based on geographic area. When some spatial management tools, such as closed areas, are deployed, the collection of fishery-dependent data is reduced or eliminated. This loss of data can compromise effective fisheries management. The Issues and Options Paper considers approaches to collect data and perform research in areas that may otherwise restrict commercial or recreational fishing, making the collection of fisheries-dependent data challenging or not possible. During scoping, public feedback will be accepted via written comments or at scoping meetings as described in separate **Federal Register** notices.

Request for Comments

NMFS anticipates changes to management of the shark species that are in the HMS management unit. Based on the guidelines for NS1. This notice requests additional information and comments from the public related to the establishment of TACs and ACLs. The HMS shark regulations govern conservation and management of sharks in the management unit, under the authority of the Magnuson-Stevens Act. For sharks, the ''management unit'' means all fish of the species listed in Table 1 of Appendix A to 50 CFR part 635, in the western north Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea. For some shark stocks caught in association with ICCAT fisheries, ICCAT adopts conservation and management measures, and NMFS implements them consistent with ATCA. NMFS welcomes comments on the appropriate scope of the action as it relates to the species with management measures under ICCAT. The document includes a summary of the anticipated purpose and need for the FMP amendment, and the potential environmental, social, and economic impacts of some potential conservation and management options. The scoping document is available online at the HMS website: *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species.* The scoping meetings and a conference call will be announced in a subsequent notice in the **Federal Register**. The comments received on the scoping document will be considered to assist in the development of the upcoming amendment to the 2006 Consolidated Atlantic HMS FMP. NMFS anticipates that a proposed rule and draft environment impact statement (DEIS) will be available in late 2019 and the Final Amendment 14 and its related documents will be available in 2020.

Dated: May 16, 2019.

Kelly L. Denit,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–10567 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 84, No. 98
Tuesday, May 21, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Virginia Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA) that a meeting of the Virginia Advisory Committee to the Commission will convene by conference call at 12:00 p.m. (EST) on Wednesday, May 22, 2019. The purpose of the meeting is to discuss preparation of the Committee's report on hate crimes in Virginia.

DATES: Wednesday, May 22, 2019 at 12:00 p.m. EST.

Public Call-In Information: Conference call-in number: 1–888–394–8218 and conference call ID number: 8310490.

FOR FURTHER INFORMATION CONTACT: Ivy Davis at *ero@usccr.gov* or by phone at 202–376–7533.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–888–394–8218 and conference call ID number: 8310490. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1–800–877–8339 and providing the operator with the toll-free conference call-in number: 1–888–394–8218 and conference call ID number: 8310490.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The written comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, or emailed to Corrine Sanders at *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at (202) 376–7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at: *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzjXAAQ,* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

Agenda: Wednesday, May 22, 2019

I. Rollcall

II. Welcome

III. Discuss Preparation of Committee Report

IV. Other Business

V. Next Meeting

VI. Open Comment

VII. Adjourn

Dated: May 15, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–10518 Filed 5–20–19; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–843]

Certain Lined Paper Products From India: Final Results of Antidumping Duty Administrative Review; 2016–2017

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that Kokuyo Riddhi Paper Products Pvt. Ltd. (Kokuyo) and Navneet Education Ltd. (Navneet) did not make sales of certain lined paper products (lined paper) from India below normal value. The period of review (POR) is September 1, 2016, through August 31, 2017.

DATES: Effective May 21, 2019.

FOR FURTHER INFORMATION CONTACT: Cindy Robinson (for Navneet) and Joy Zhang (for Kokuyo), AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–3797 and (202) 482–1168, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 2018, Commerce published the *Preliminary Results.*[1] For a history of events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[2] On December 21, 2018, we extended the deadline for these final results until April 5, 2019.[3] Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on

[1] *See Certain Lined Paper Products from India: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017,* 83 FR 50886 (October 10, 2018) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of Administrative Review; 2016–2017,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Certain Lined Paper Products from India: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review: 2016–2017,'' dated December 21, 2018.

January 29, 2019.[4] Accordingly, the revised deadline for the final results of this administrative review is now May 15, 2019.

Scope of the Order

The merchandise covered by the order is lined paper. The lined paper subject to the order is currently classifiable under subheadings 4811.90.9035, 4811.90.9080, 4820.30.0040, 4810.22.5044, 4811.90.9050, 4811.90.9090, 4820.10.2010, 4820.10.2020, 4820.10.2030, 4820.10.2040, 4820.10.2050, 4820.10.2060, and 4820.10.4000 of the Harmonized Tariff Schedule of the United States.[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties are addressed in the Issues and Decision Memorandum. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.trade.gov/frn/.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is attached to this notice in the Appendix.

Changes Since the Preliminary Results

Based on our analysis of the comments received from parties, we made certain revisions to the margin calculations of Navneet and Kokuyo.[6]

Final Results of the Review

As a result of this review, we determine the following weighted-average dumping margins for the period September 1, 2016, through August 31, 2017:

Manufacturer/exporter	Weighted-average dumping margin (percent)
Kokuyo Riddhi Paper Products Pvt. Ltd	0.00
Navneet Education Ltd	0.00
Magic International Pvt. Ltd	0.00
Pioneer Stationery Pvt Ltd	0.00
SGM Paper Products	0.00

For the companies that were not selected for individual review, we assigned a rate based on the rates for the respondents that were selected for individual review, excluding rates that are zero, *de minimis,* or based entirely on facts available.[7] In accordance with the U.S. Court of Appeals for the Federal Circuit's decision in *Albemarle Corp.* v. *United States,* we are applying to the three companies not selected for individual review the zero percent rates calculated for Navneet and Kokuyo.[8] These are the only rates determined in this review for individual respondents and, thus, should be applied to the three firms not selected for individual review under section 735(c)(5)(B) of the Act.

Disclosure and Public Comment

We intend to disclose the calculations performed to parties in this proceeding within five days after publication of these final results in the **Federal Register**, in accordance with section 751(a) of the Act and 19 CFR 351.224(b).

Assessment Rates

Upon completion of this administrative review, Commerce shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. Because the weighted-average dumping margins of Kokuyo, Navneet, and the three firms not selected for individual examination have been determined to be zero within the meaning of 19 CFR 351.106(c), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. In accordance with Commerce's practice, for entries of subject merchandise during the POR for which Navneet and Kokuyo did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate if there is no company-specific rate for the intermediate company(ies) involved in the transaction.[9] Commerce intends to issue assessment instructions directly to CBP 15 days after publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of lined paper from India entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the respondents noted above will be the rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 3.91 percent, the all-others rate established in the investigation, as modified by the section 129 determination.[10] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that

[4] *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding affected by the partial federal government closure have been extended by 40 days.

[5] For a full description of the scope of the order, *see* the Issues and Decision Memorandum.

[6] *See* Issues and Decision Memorandum*; see also* Memorandum, ''Certain Lined Paper Products from India (2016–2017): Sales and Cost of Production Calculation Memorandum for the Final Results of Navneet Education;'' and ''Analysis Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Lined Paper Products from India: Kokuyo Riddhi Paper Products Pvt. Ltd.'''' The analysis memoranda are dated concurrently with this notice.

[7] *See* section 735(c)(5)(A) of the Tariff Act of 1930, as amended (the Act).

[8] *See Albemarle Corp.* v. *United States,* 821 F.3d 1345 (Fed. Cir. 2016) (*Albemarle Corp.* v. *United States*).

[9] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[10] *See Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders,* 72 FR 25261 (May 4, 2007).

reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties.

Notifications to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221.

Dated: May 15, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Final Decision Memorandum

[FR Doc. 2019–10546 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–884]

Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Notice of Court Decision Not in Harmony With Amended Final Determination of the Countervailing Duty Investigation

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On May 1, 2019, the United States Court of International Trade (CIT) sustained the final remand results pertaining to the countervailing duty (CVD) investigation on certain hot-rolled steel flat products from the Republic of Korea covering the period January 1, 2014, through December 31, 2014. The Department of Commerce (Commerce) is notifying the public that the final judgment in this case is not in harmony with the *Amended Final Determination* of the CVD investigation and that Commerce is amending the *Amended Final Determination* with respect to the CVD rate assigned to POSCO.

DATES: Applicable May 11, 2019.

FOR FURTHER INFORMATION CONTACT: Carrie Bethea, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1491.

SUPPLEMENTARY INFORMATION:

Background

On August 12, 2016, Commerce published its *Final Determination*.[1] Upon consideration of ministerial error allegations, Commerce issued an *Amended Final Determination* and calculated a subsidy rate of 56.68 percent for POSCO.[2]

On September 11, 2018, the CIT remanded various aspects of the *Amended Final Determination* to Commerce.[3] In its *Remand Order,* the CIT held that substantial evidence supports Commerce's decision to apply adverse facts available (AFA).[4] The CIT held that the record demonstrated that POSCO failed to provide requested information in a timely manner, reflecting a failure to act to the best of its ability.[5]

However, the CIT also held that Commerce had not conducted a ''fact-specific inquiry,'' under the relatively new statutory language of section 776(d)(2) of the Tariff Act of 1930, as amended (the Act) and had not ''provide{d} its reasons for selecting the highest rate out of all potential countervailable subsidy rates.'' [6] The CIT, therefore, instructed Commerce to conduct this fact-specific inquiry.[7] In addition, because the CIT remanded Commerce's *Amended Final Determination* on this basis, the CIT reserved consideration of whether Commerce failed to corroborate the two selected rates in calculating POSCO's total AFA margin.[8] Pursuant to the *Remand Order,* Commerce issued its Final Redetermination, which addressed the CIT's holdings and revised the CVD rate for POSCO to 41.57 percent.[9] Specifically, we continued to find it appropriate to select the highest rate as an AFA rate, but selected the 1.05 percent rate from *Washers from Korea* to address concerns regarding the corroboration of the 1.64 percent rate used in the *Amended Final Determination*.[10] On May 1, 2019, the CIT sustained in whole Commerce's Final Redetermination.[11]

Timken Notice

In its decision in *Timken,*[12] as clarified by *Diamond Sawblades,*[13] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Act, Commerce must publish a notice of court decision that is not ''in harmony'' with Commerce's determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's May 1, 2019 final judgment, sustaining Commerce's selection of the 1.05 percent rate from *Washers from Korea* as the subsidy rate for programs that were calculated on the basis of adverse facts

[1] *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination,* 81 FR 53439 (August 12, 2016) (*Final Determination*) and accompanying Issues and Decision Memorandum.

[2] *See Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Order,* 81 FR 67960 (October 3, 2016) (*Amended Final Determination*).

[3] *See POSCO* v. *United States,* Consol. Court No. 16–00227, Slip Op. 18–117 (CIT 2018) (*Remand Order*).

[4] *See Remand Order* at 15.

[5] *Id.* at 13–14, 17.

[6] *Id.* at 19.

[7] *Id.* at 15.

[8] *Id.*

[9] *See POSCO* v. *United States,* Consol. Court No. 16–00227, Slip Op. 18–117 (CIT 2018) Final Results of Redetermination Pursuant to Court Remand, dated November 13, 2018, at 24.

[10] *Id.* at 17–19.

[11] *See POSCO* v. *United States,* Consol. Court No. 16–00227, Slip Op. 19–52 (CIT May 1, 2019).

[12] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[13] *See Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

available and the resulting 41.57 percent CVD rate for POSCO, constitutes a final decision of that court that is not in harmony with the *Final Amended Determination.* This notice is published in fulfillment of the publication requirements of *Timken.*

This notice is issued and published in accordance with sections 516A(e)(1), 705(c)(1)(B), and 777(i)(1) of the Act.

Dated: May 15, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2019–10544 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF862

Endangered Species; File No. 21367

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; receipt of application for a permit modification.

SUMMARY: Notice is hereby given that Christopher Marshall, Ph.D., Texas A&M University at Galveston, 200 Seawolf Parkway, Galveston, TX 77553, has requested a modification to scientific research Permit No. 21367.

DATES: Written, telefaxed, or email comments must be received on or before June 20, 2019.

ADDRESSES: The modification request and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 21367 Mod 3 from the list of available applications. These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone: (301) 427–8401; fax: (301) 713–0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Erin Markin, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 21367, issued on March 15, 2018 (83 FR 17655) is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 21367 authorizes the permit holder to conduct research on sea turtles to characterize the movement, habitat use, foraging ecology, and health of sea turtles on the Texas coast and in the western Gulf of Mexico. Researchers are authorized to capture sea turtles by hand, dip net, tangle net or cast net and perform the following procedures prior to release of animals: Examination, marking, morphometrics, biological sampling, and attachment of transmitters. The permit holder requests authorization to increase the number of green sea turtles (*Chelonia mydas*) that may be taken annually from 45 to 80 animals to accommodate increased efforts in Laguna Madre. No other changes to the permit are requested.

Dated: May 16, 2019.

Julia Marie Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–10548 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–BI08

Atlantic Highly Migratory Species; Amendment 13 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent (NOI) to prepare an environmental impact analysis; notice of availability of issues and options paper; request for comments.

SUMMARY: NMFS announces its intent to prepare an environmental impact analysis under the National Environmental Policy Act (NEPA), and the availability of the Issues and Options Paper for Amendment 13 to the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) (Issues and Options Paper). This notice announces the start of a public process for determining the scope of significant issues related to the management of Atlantic bluefin tuna (bluefin), and addressing issues identified by considering modification of bluefin regulations. The catalysts for beginning this regulatory process are the release of the Draft Three-Year Review of the IBQ Program (Three-Year Review), recent changes in the bluefin fishery, and advice and input from the HMS Advisory Panel and the public.

The environmental impact analysis will include an assessment of the potential effects of alternative measures for management of bluefin under the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP). The subjects in the Issues and Options Paper include refining the Individual Bluefin Quota (IBQ) Program, reassessing allocation of the bluefin quota and subquota, including the potential elimination or phasing out of the Purse Seine category, and other regulatory provisions regarding directed fisheries and incidental pelagic longline fisheries. The scoping process and environmental impact analysis would determine whether existing management measures are the best means of achieving current management objectives and providing flexibility to adapt to variability in the future, consistent with the 2006 Consolidated HMS FMP, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Atlantic Tunas Convention Act (ATCA), and other relevant Federal laws. NMFS will use the scoping process and the draft environmental impact analysis to consider development of Amendment 13 to the 2006 Consolidated HMS FMP, if warranted.

NMFS is requesting comments on this NOI and the management options described in the Issues and Options Paper, and other potential regulatory provisions regarding the bluefin directed fisheries and incidental pelagic longline fishery that would meet the purpose and need for this action. NMFS will hold public scoping meetings and a webinar to gather comment on these measures and potential management options. The time and location details of the scoping meetings and webinar will be announced in a separate **Federal Register** notice. NMFS will also present

the Issues and Options Paper at the HMS Advisory Panel Meeting on May 22, 2019 (*https://www.fisheries.noaa.gov/event/may-2019-hms-advisory-panel-meeting*).

DATES: Written comments on this NOI and the scoping document must be received on or before July 31, 2019.

ADDRESSES: The presentation at the HMS Advisory Panel will be held at the Sheraton Silver Spring Hotel, 8777 Georgia Avenue, Silver Spring, MD 20910. You may submit comments, identified by ''NOAA–NMFS–2019–0042,'' by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and search for: *NOAA–NMFS–2019–0042,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Tom Warren, Highly Migratory Species Management Division, NOAA Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: Comments sent by any other method, or to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

The Issues and Options Paper is available by sending your request to Tom Warren at the mailing address specified above, or by calling the phone numbers indicated below. The Issues and Options Paper, the Three-Year Review, the 2006 Consolidated HMS FMP, and FMP amendments may also be downloaded from the HMS website at: *https://www.fisheries.noaa.gov/action/amendment-13-2006-consolidated-hms-fishery-management-plan-bluefin-management-measures.*

FOR FURTHER INFORMATION CONTACT: Tom Warren at 978–281–9347, or Carrie Soltanoff at 301–427–8587, or online at *https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species.*

SUPPLEMENTARY INFORMATION:

Background

Regulations implemented under the authority of ATCA (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) governing the harvest of Atlantic HMS, including bluefin, by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. The 1999 Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (1999 FMP) allocated the annual U.S. bluefin quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) to bluefin quota categories based on landings from 1983–1991. Landings were the only portion of catch (*i.e.,* ''catch'' includes both landings and dead discards) that were factored into the 1999 FMP percentage allocation analysis for the various bluefin fisheries at that time, as dead discards were accounted for under a separate ICCAT allocation. In 2006, NMFS finalized the 2006 Consolidated Atlantic HMS FMP, to simplify management and better coordinate domestic conservation and management of Atlantic HMS. This consolidated HMS FMP carried forward many of the objectives and measures from the 1999 FMP (*e.g.,* reduce dead discard and post-release mortality of Atlantic HMS in directed and non-directed fisheries; reduce bycatch and bycatch mortality). The bluefin quota category percentage allocations continued unchanged in the 2006 Consolidated HMS FMP.

Amendment 7 to the 2006 Consolidated HMS FMP (Amendment 7; 79 FR 71510, December 2, 2014) implemented several measures for the pelagic longline fishery including, but not limited to, gear restricted areas, the IBQ catch share program, and catch reporting of each pelagic longline set using vessel monitoring systems. Amendment 7 also implemented an annual adjustment of the Purse Seine category quota, using a formula based on the catch by purse seine fishery participants in the previous year. This allows NMFS to adjust the Purse Seine category quota either upwards or downwards based on recent fishing activity. Amendment 7 provided the opportunity for Purse Seine category participants to lease quota to (or from) pelagic longline vessels to ensure that the IBQ leasing market met the needs of the pelagic longline fishery to account for bluefin catch, and provided additional flexibility for the Purse Seine category participants.

The most recent stock assessment for western Atlantic bluefin was conducted in 2017 by the Standing Committee on Research and Statistics (SCRS), the scientific body of ICCAT. At its November 2017 meeting, after considering the SCRS advice, ICCAT adopted a recommendation for an interim conservation and management plan for western Atlantic bluefin tuna for 2018 through 2020 (ICCAT Recommendation 17–06). Following the 2017 stock assessment, and after applying domestic stock status determination criteria, NMFS concluded that the overfished status of the bluefin stock was unknown, and that the stock was not subject to overfishing. NMFS stated that changing from ''overfished'' to ''unknown'' status was appropriate, given the continued inability to resolve the two widely divergent stock recruitment scenarios approach taken under past SCRS stock assessments, and the SCRS' use of a different approach based on the fishing mortality rate in the 2017 assessment.

In Amendment 7, NMFS proposed and finalized a plan to formally evaluate the success and performance of the IBQ Program after three years of operation and to provide the HMS Advisory Panel with a publicly-available written document with its findings. The Draft Three-Year Review contains preliminary conclusions of the program's effectiveness in meeting the goals and objectives specified in Amendment 7, as well as evaluates the various components of this catch share program. The Three-Year Review was released on May 10, 2019, and included analyses of the IBQ Program since its inception. Amendment 7 anticipated that NMFS would consider regulatory changes to the IBQ Program after its formal review. The Draft Three-Year Review provides a large amount of data and is relevant for consideration of such changes.

The Draft Three-Year Review made a preliminary conclusion that the IBQ Program fully achieved many Amendment 7 objectives such as reducing bluefin dead discards, providing incentives to avoid bluefin, implementing individual accountability for bluefin catch, providing flexibility to obtain quota from other vessels, and minimizing constraints on fishing for target species. However, the review found that the IBQ Program only partially achieved the objective of maintaining profitability. The Three-Year Review also made the following preliminary recommendations regarding the IBQ Program components (not to be confused with the objectives). Regarding share distributions and IBQ individual accountability rules, the Three-Year Review recommended considering a different method of share or quota distribution among participants. The current share distribution method

reflects historical catch and participants in the fishery, but may not reflect current fishery participation, nor align with the need for quota. Regarding Accumulation Caps, the Draft Three-Year Review stated: ''A more conservative cap on the amount of IBQ used or owned should be considered to reduce the risk of entities controlling a large percentage of IBQ.'' The Issues and Options Paper for Amendment 13 includes options to address these issues.

Similar to the pelagic longline fishery, the directed bluefin fisheries have evolved over time, and the Issues and Options Paper includes several issues related to the directed bluefin fisheries. Since 1982, the Purse Seine category has been limited to participants who historically were financially dependent on the fishery. Although new entrants are prohibited, an owner of a vessel with an Atlantic Tunas permit in the Purse Seine category may transfer the permit to another purse seine vessel that he or she owns. In the purse seine fishery, since 2015, there have been no landings of bluefin by purse seine vessels. Only one purse seine vessel operated, made only a small number of sets over a couple of years, and accounted for only a small percentage of commercial bluefin landings between 2005 and 2015 (one, twelve, two, less than one, eight, six, and five percent of commercial bluefin landings in 2006, 2007, 2009, 2012, 2013, 2014, and 2015, respectively). While the purse seine fishery has been mostly inactive over the past decade-plus, handgear fisheries have remained very active, landing large amounts of bluefin in recent years, and have renewed interest in the optimal and fair allocation of bluefin quota among seasons and geographic areas.

HMS Advisory Panel members and the public have suggested sun-setting or phasing out the purse seine fishery to optimize the utilization of bluefin quota and increase certainty in the bluefin fishery. Many permitted commercial and recreational vessels that may target bluefin, as well as the pelagic longline vessels that may not target bluefin, but that rely on bluefin quota to facilitate directed fishing operations for target species, would benefit from additional bluefin quota and increased certainty regarding quota availability. Prior to Amendment 7, the Purse Seine category was allocated 18.5 percent (over 150 mt) of the U.S. bluefin quota. Since 2015, when Amendment 7 implemented an annual redistribution of Purse Seine category quota (to the Reserve category) based on the previous year's catch by the purse seine fishery, the Purse Seine category quota has been adjusted downward. Amendment 7 also implemented the ability of the purse seine fishery participants to lease IBQ to or from the pelagic longline fishery. In 2018 and 2019, the Purse Seine category quota was adjusted downward from its baseline amount of 219.5 to 55 mt (representing four percent of the bluefin quota), and limited amounts of bluefin quota were leased to pelagic longline vessels within the IBQ Program. Although limited in scope, IBQ leases from Purse Seine participants to pelagic longline vessel owners were a meaningful initial component of the IBQ Program, contributing to a successful leasing market. Redistribution of Purse Seine category quota may provide more quota to active bluefin fisheries, which may address desire for more flexibility and concerns about premature fishery closures, as well as provide additional quota for allocation to the pelagic longline fishery.

The Amendment 13 Issues and Options Paper will be used in 2019 for scoping, a public process during which NMFS will consider a range of issues and objectives, as well as possible options, for bluefin management. The options being presented in the Issues and Options Paper consider the preliminary results of the Draft Three-Year Review and respond to recent changes in the bluefin fishery and input from the public and HMS Advisory Panel. The options include refining the IBQ program, reassessing allocation of bluefin tuna quotas (including the potential elimination or phasing out of the Purse Seine category) and other regulatory provisions regarding bluefin directed fisheries and bycatch in the pelagic longline fishery, to determine if existing measures are the best means of achieving current management objectives for bluefin management. During scoping, public feedback will be accepted via written comments or at scoping meetings as described in separate **Federal Register** notices.

NMFS has several ongoing actions affecting HMS management that are, or soon will be, available for public comment. While each of these actions are separate, they are interrelated in some ways, and the comment periods may overlap. Depending on the outcomes, each action could have impacts on the other actions. As noted above, NMFS recently released the Draft Three-Year Review, which is expected to be finalized in September 2019 after consideration by the HMS Advisory Panel. The following details about these ongoing actions are provided for the regulated community's information and background.

NMFS is currently in the process of developing a Proposed Rule Modifying Pelagic Longline Bluefin Tuna Area-Based and Weak Hook Management Measures. To analyze the potential environmental effects of a range of alternatives, NMFS recently released a Draft Environmental Impact Statement (DEIS). The DEIS evaluates whether current area-based and gear management measures remain necessary to reduce and/or maintain low numbers of bluefin tuna discards and interactions in the pelagic longline fishery, given more recent management measures, including the IBQ Program. The DEIS prefers alternatives that undertake a process to evaluate the need for the Northeastern United States Closed Area and the Gulf of Mexico Gear Restricted Area; removes the Cape Hatteras Gear Restricted Area; and adjusts the Gulf of Mexico weak hook effective period from year-round to seasonal (January–June). The comment period for the DEIS and for an anticipated Proposed Rule will be open through July 31, 2019. After consideration of public comment, NMFS expect to finalize the rule in the late fall of 2019. The proposed rule related to this DEIS is expected to be released shortly.

Recently, NMFS also released an Issues and Options Paper considering approaches to collect data and perform research in areas that are currently closed to certain gears or fishing activities for Atlantic HMS. Such research will help evaluate and support spatial fisheries management for Atlantic HMS. ''Spatial management'' refers to a suite of fisheries conservation and management measures that are based on geographic area. When some spatial management tools, such as closed areas, are deployed, the collection of fishery-dependent data is reduced or eliminated. This loss of data can compromise effective fisheries management. The Issues and Options Paper considers approaches to collect data and perform research in areas that may otherwise restrict commercial or recreational fishing, making the collection of fisheries-dependent data challenging or not possible. During scoping, public feedback will be accepted via written comments or at scoping meetings as described in separate **Federal Register** notices.

Finally, NMFS has also recently published an Issues and Options Paper for Amendment 14 that reviews annual catch limits and other target reference points for sharks. This action could result in a different process for establishing the annual catch limits for sharks, and therefore could affect all fishermen, commercial and recreational, that target or incidentally catch sharks. During scoping, public feedback will be

accepted via written comments or scoping meetings as described a separate **Federal Register** notice.

Scoping Process

NMFS encourages all persons affected or otherwise interested in bluefin management measures to participate in the process to determine the scope and significance of issues to be analyzed in the draft environmental impact analysis and regulatory action for Amendment 13. All such persons are encouraged to submit written comments (see **ADDRESSES**), and are welcome to address the specific measures in the Issues and Options Paper. Comments may also be submitted at one of the scoping meetings or the public webinar to be identified in a future **Federal Register** notice.

NMFS intends to hold scoping meetings in the geographic areas that may be affected by these measures, including locations on the Atlantic and Gulf of Mexico coasts, and will consult with the regional fishery management councils in the Atlantic and Gulf of Mexico. NMFS expects to present the scoping document at the May 21–23, 2019 HMS Advisory Panel meeting (see **ADDRESSES**).

After scoping has been completed and public comment gathered and analyzed, NMFS will determine if it is necessary to proceed with preparation of a draft environmental impact analysis and proposed rule for Amendment 13, which would include additional opportunities for public comment. The scope of the draft environmental impact analysis would consist of the range of actions, alternatives, and impacts to be considered. Alternatives may include, but are not limited to, the following: Not amending the current regulations (*i.e.,* taking no action); developing a regulatory action that contains management measures such as those described in the Issues and Options Paper; or other reasonable courses of action. This scoping process also will identify, and eliminate from further detailed analysis, issues that may not meet the purpose and need of the action.

The process of developing a regulatory action is expected to take approximately two years.

Until the draft environmental impact analysis and proposed rule are finalized or until other regulations are put into place, the current regulations remain in effect.

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

Dated: May 16, 2019.

Kelly L. Denit,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–10565 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XH036

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting webinar.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council's) Scientific and Statistical Committee's (SSC's) Economics Subcommittee will hold a webinar to review new economic analyses in three draft coho rebuilding plans. The SSC Economics Subcommittee webinar is open to the public. Public comments during the webinar will be received from attendees at the discretion of the SSC Economics Subcommittee chair.

DATES: The SSC Economics Subcommittee webinar will commence at 1 p.m. PDT, Tuesday, June 4, 2019 and continue until 4 p.m. or as necessary to complete business for the day.

ADDRESSES: The meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar (1) join the meeting by visiting this link *http://www.gotomeeting.com/online/webinar/join-webinar,* (2) enter the Webinar ID: 800–770–499, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number 1–562–247–8321, (2) enter the attendee phone audio access code 176–615–134 when prompted, and (3) enter your unique audio phone pin (shown after joining the webinar). *Note:* We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate.

Technical Information and System Requirements

PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the *https://www.gotomeeting.com/webinar/ipad-iphone-android-webinar-apps*). You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at (503) 820–2280, extension 411 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Mr. John DeVore or Ms. Robin Ehlke, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary objective of the SSC Economics Subcommittee webinar is to review new analyses of economic impacts associated with alternatives in three draft rebuilding plans for Queets River, Snohomish River, and Strait of Juan de Fuca Coho. Other items on the Pacific Council's June 2019 agenda may be discussed, but no management actions will be decided in this webinar. The SSC Economics Subcommittee members' role will be development of recommendations and a report for consideration by the SSC and Pacific Council at the June 2019 meeting in San Diego, CA.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt, (503) 820–2411, at least 10 business days prior to the meeting date.

Dated: May 16, 2019.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2019–10557 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG956

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the South Quay Wall Recapitalization Project, Mayport, Florida

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the U.S. Navy Naval Facilities Engineering Command Southeast and Naval Facilities Engineering Command Atlantic (Navy) for authorization to take marine mammals incidental to the South Quay Wall Recapitalization Project, Naval Station (NAVSTA) Mayport, Florida. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in *Request for Public Comments* at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than June 20, 2019.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Daly@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

The NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations indicated above and amended the definition of ''harassment'' as it applies to a ''military readiness activity.'' The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On December 4, 2018, NMFS received a request from the Navy for an IHA to take marine mammals incidental to pile driving at the South Quay wall, NAVSTA Mayport, Florida. The application was deemed adequate and complete on April 16, 2019. The Navy's request is for take of a small number of bottlenose dolphins, by Level B harassment only. Neither the Navy nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued several IHAs to the Navy for similar work at NAVSTA Mayport, specifically at Bravo Wharf (81 FR 52637, August 9, 2018; 83 FR 9287, March 5, 2019) and Wharf C–2 (78 FR 71566, November 29, 2013; 80 FR 55598, September 16, 2015). The Navy complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information

regarding their monitoring results may be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Description of Proposed Activity

Overview

The Navy proposes to install 240 24-inch (in) steel sheet piles within 5 feet (ft) from the existing South Quay bulkhead located at the end of a channel within the NAVSTA Mayport turning basin along the St. Johns River, Florida. The purpose of the project is to support the existing bulkhead wall that has been weakened by the formation of voids within the wall. The Navy anticipates the entire project will take up to one year; however, in-water pile driving work would be limited to 35 days. The IHA would be valid from February 15, 2020, to February 14, 2021.

Pile driving would elevate noise levels within the turning basin; however, given the location of the South Quay wall at the end of a man-made channel, noise above NMFS harassment thresholds would not extend outside the basin. The configuration of the channel limits noise propagation above the Level B harassment threshold to approximately 0.5 square kilometers (km^2). Bottlenose dolphins (*Tursiops truncatus*) exposed to pile driving may be taken, by Level B harassment. Harassment would be short-term and likely include temporary behavioral modifications (*e.g.,* avoidance, increased swim speeds, foraging changes, etc.).

Dates and Duration

The proposed IHA would be effective February 15, 2010, through February 14, 2021; however, vibratory pile driving is expected to occur for only 30 days with impact pile driving occurring on up to 5 days. Vibratory driving would occur for a maximum of 45 minutes per day while the Navy will only install one pile per day requiring 20 strikes with an impact hammer. Impact hammering would only occur if the piles cannot be set with a vibratory hammer. Pile driving would be limited to daylight hours only.

Specific Geographic Region

NAVSTA Mayport is located at the mouth of the St. Johns River, approximately 15 miles east of the Jacksonville Central Business District in Duval County, Florida. It is bordered to the north by the St. Johns River, to the south by Jacksonville, to the east by the Atlantic Ocean, and to the west by the Village of Mayport and the Atlantic Coastal Waterway. The Mayport turning basin is a deep-water surface ship berthing facility whose entrance meets the main navigation channel at the mouth of the St. Johns River. Ship berthing facilities are provided at 16 locations along wharves A through F around the turning basin perimeter. The turning basin is approximately 2,000 by 3,000 ft in area, and is connected to the St. Johns River by a 500-ft-wide entrance channel. The South Quay wall is located along the southern edge of the Mayport turning basin (Figure 1). All pile driving would occur at the existing South Quay wall.

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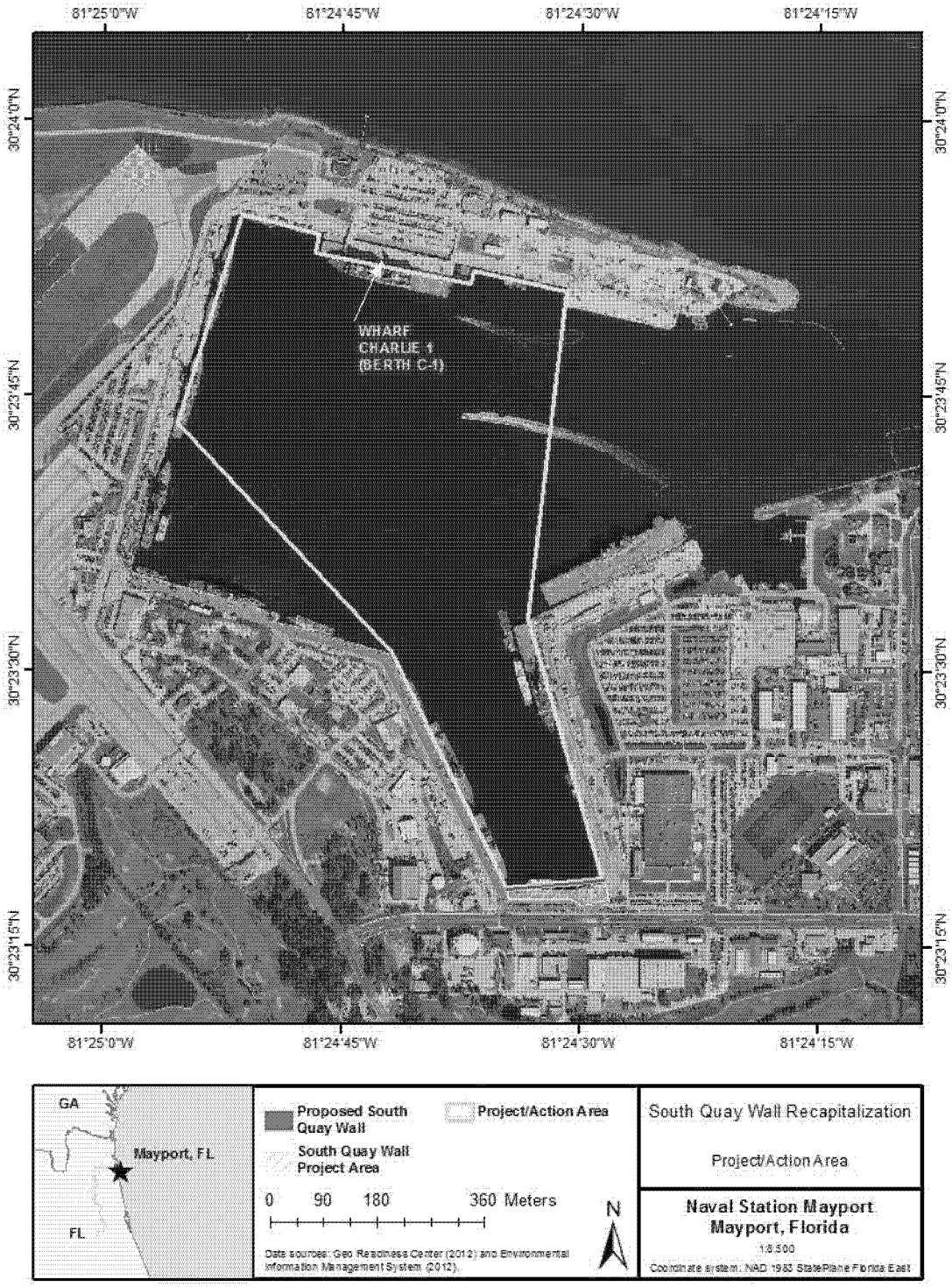

Figure 1. Map of NAVSTA Mayport and the South Quay Wall (red line).

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Detailed Description of Specific Activity

The South Quay Wall Recapitalization Project includes the construction of a new sheet pile wall within five ft of the current South Quay wall in order to support the pre-existing bulkhead that has been weakened by the formation of voids within the wall. In-water work includes only pile driving for a new sheet pile bulkhead. The wall will be anchored at the top and fill consisting of clean gravel and/or flowable concrete will be placed behind the wall. Concrete and/or flowable fill will also be used to fill the voids that have formed along the outer edge of the South Quay wall to

prevent the further development of surface settling and voids caused by the formation of interconnected cracks, fissures and holes. A concrete cap will be formed along the top and outside face of the wall to tie the entire structure together and provide a berthing surface for vessels.

Depending on weight-bearing and structural integrity issues at the current South Quay wall, either shore-based or barge-based cranes will be used for pile installation. If necessary, a crane barge with a pile installation suite (pile leads, vibratory hammer and an impact hammer) will mobilize to the project site with a material barge. A pile driving template (approximately 25 ft in length) will be mounted to the crane. This allows the crane to control the alignment of the piles as they are driven. Once the crane is properly aligned, the sheet piles will be driven to the appropriate depth using the vibratory hammer. Impact pile driving will only be used as a contingency in cases when vibratory driving is insufficient. Once all of the piles are driven, closure plates will be attached between the existing adjacent sheet pile wall and the new wall end terminations. Typically, these are welded in place using underwater welding techniques.

To construct the new wall, the Navy will install 240 individual sheet piles over the course of 35 days, averaging 7–10 sheet piles installed per day, with a maximum of 15 individual piles installed per day. Of the 35 total days of installation, 30 days were reserved for vibratory driving and the remaining 5 days were reserved for contingency impact driving. The Navy estimates each pile will require three minutes of active driving per pile (maximum of 45 minutes per day). When impact driving, the Navy estimates they will install one pile per day, with each pile requiring 20 hammer strikes. The use of impact driving would be restricted to when vibratory driving is insufficient. During a similar project completed at adjacent Wharf C–2, only seven of the several hundred piles installed required use of an impact hammer. Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see *Proposed Mitigation* and *Proposed Monitoring and Reporting*).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

There are four marine mammal species which may inhabit or transit near NAVSTA Mayport at the mouth of the St. Johns River and in nearby nearshore Atlantic Ocean. These include the bottlenose dolphin, Atlantic spotted dolphin (*Stenella frontalis*), North Atlantic right whale (*Eubalaena glacialis*), and humpback whale (*Megaptera novaeangliae*). Please refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts and to the Navy's Marine Resource Assessment for the Charleston/Jacksonville Operating Area, which documents and describes the marine resources that occur in Navy operating areas of the Southeast (Navy, 2008; available at *www.navfac.navy.mil/products_and_services/ev/products_and_services/marine_resources/marine_resource_assessments.html*). All species other than the bottlenose dolphin are not included for further analysis due to extreme rarity within close proximity to NAVSTA Mayport and lack of sightings within NAVSTA Mayport. Unlike previous pile driving projects at NAVSTA Mayport where harassment thresholds extended into the mouth of the St. Johns River and nearby coastal ocean waters, the South Quay wall is positioned such that pile driving noise is not anticipated to propagate outside the turning basin. Therefore, we limit our discussion to bottlenose dolphins.

Table 1 lists bottlenose dolphin stocks with expected potential for occurrence at NAVSTA Mayport and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. 2018 Draft SARs (Hayes *et al.,* 2018). All values presented in Table 1 are the most recent available at the time of publication.

TABLE 1—BOTTLENOSE DOLPHIN STOCKS POTENTIALLY PRESENT AT NAVSTA MAYPORT

Species	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR [3]	Annual M/SI [4]	Relative occurrence; season of occurrence
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose dolphin ..	Western North Atlantic, southern migratory coastal.	-/D; Y	9,173 (0.46; 6,326; 2010–11).	63	0–12	Possibly common; [8] Jan–Mar.
	Western North Atlantic, northern Florida coastal.	-/D; Y	1,219 (0.67; 730; 2010–11).	7	0.4	Possibly common; [8] year-round.
	Jacksonville Estuarine System [6].	-; Y	412 [7] (0.06; unk; 1994–97).	undet.	1.2	Possibly common; [8] year-round.

[1] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR (see footnote 3) or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable. For certain stocks, abundance estimates are actual counts of animals and there is no associated CV. The most recent abundance survey that is reflected in the abundance estimate is presented; there may be more recent surveys that have not yet been incorporated into the estimate.

[3] Potential biological removal, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP).

[4] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, subsistence hunting, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value. All values presented here are from the draft 2015 SARs (*www.nmfs.noaa.gov/pr/sars/draft.htm*).

[5] Abundance estimates (and resulting PBR values) for these stocks are new values presented in the draft 2015 SARs. This information was made available for public comment and is currently under review and therefore may be revised prior to finalizing the 2015 SARs. However, we consider this information to be the best available for use in this document.

[6] Abundance estimates for this stock are greater than eight years old and are therefore not considered current. PBR is considered undetermined for these stocks, as there is no current minimum abundance estimate for use in calculation. We nevertheless present the most recent abundance estimates and PBR values, as these represent the best available information for use in this document.

[7] This abundance estimate is considered an overestimate because it includes non- and seasonally-resident animals.

[8] Bottlenose dolphins in general are common in the project area, but it is not possible to readily identify them to stock. Therefore, these three stocks are listed as possibly common as we have no information about which stock commonly only occurs.

All species that could potentially occur in the proposed survey areas are included in Table 1. As described below, all three bottlenose dolphin stocks temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing it.

In addition, the West Indian manatee (*Trichechus manatus latirostris*) may be found at NAVSTA Mayport. However, manatees are managed by the U.S. Fish and Wildlife Service and are not considered further in this document.

In the Mayport area, four stocks of bottlenose dolphins are currently managed, none of which are protected under the ESA. Of the four stocks—offshore, southern migratory coastal, northern Florida coastal, and Jacksonville estuarine system—only the latter three are likely to occur in the action area. Bottlenose dolphins typically occur in groups of 2–15 individuals (Shane *et al.,* 1986; Kerr *et al.,* 2005). Although significantly larger groups have also been reported, smaller groups are typical of shallow, confined waters. In addition, such waters typically support some degree of regional site fidelity and limited movement patterns (Shane *et al.,* 1986; Wells *et al.,* 1987). Observations made during marine mammal surveys conducted during 2012–2013 in the Mayport turning basin show bottlenose dolphins typically occurring individually or in pairs, or less frequently in larger groups. The maximum observed group size during these surveys is six, while the mode is one. Navy observations indicate that bottlenose dolphins rarely linger in a particular area in the turning basin, but rather appear to move purposefully through the basin and then leave, which likely reflects a lack of biological importance for these dolphins in the basin. Based on currently available information, it is not possible to determine the stock to which the dolphins occurring in the action area may belong. These stocks are described in greater detail below.

Western North Atlantic Offshore—This stock, consisting of the deep-water ecotype or offshore form of bottlenose dolphin in the western North Atlantic, is distributed primarily along the outer continental shelf and continental slope, but has been documented to occur relatively close to shore (Waring *et al.,* 2014). The separation between offshore and coastal morphotypes varies depending on location and season, with the ranges overlapping to some degree south of Cape Hatteras. Based on genetic analysis, Torres *et al.* (2003) found a distributional break at 34 km from shore, with the offshore form found exclusively seaward of 34 km and in waters deeper than 34 meters (m). Within 7.5 km of shore, all animals were of the coastal morphotype. More recently, coastwide, systematic biopsy collection surveys were conducted during the summer and winter to evaluate the degree of spatial overlap between the two morphotypes. South of Cape Hatteras, spatial overlap was found although the probability of a sampled group being from the offshore morphotype increased with increasing depth, and the closest distance for offshore animals was 7.3 km from shore (Garrison *et al.,* 2003). Noise from the project would not extent outside of the Mayport basin; therefore, individuals of the offshore morphotype would not be affected by project activities. Thus, this stock is thus excluded from further analysis.

Western North Atlantic Coastal, Southern Migratory—The coastal morphotype of bottlenose dolphin is continuously distributed from the Gulf of Mexico to the Atlantic and north approximately to Long Island (Waring *et al.,* 2014). On the Atlantic coast, Scott

et al., (1988) hypothesized a single coastal stock, citing stranding patterns during a high mortality event in 1987–88 and observed density patterns. More recent studies demonstrate that there is instead a complex mosaic of stocks (Zolman, 2002; McLellan *et al.,* 2002; Rosel *et al.,* 2009). The coastal morphotype was managed by NMFS as a single stock until 2009, when it was split into five separate stocks, including northern and southern migratory stocks. The original, single stock of coastal dolphins recognized from 1995–2001 was listed as depleted under the MMPA as a result of a 1987–88 mortality event. That designation was retained when the single stock was split into multiple coastal stocks. Therefore, all coastal stocks of bottlenose dolphins are listed as depleted under the MMPA, and are also considered strategic stocks.

According to the Scott *et al.,* (1988) hypothesis, a single stock was thought to migrate seasonally between New Jersey (summer) and central Florida (winter). Instead, it was more recently determined that a mix of resident and migratory stocks exists, with the migratory movements and spatial distribution of the southern migratory stock the most poorly understood of these. Stable isotope analysis and telemetry studies provide evidence for seasonal movements of dolphins between North Carolina and northern Florida (Knoff, 2004; Waring *et al.,* 2014), and genetic analyses and tagging studies support differentiation of northern and southern migratory stocks (Rosel *et al.,* 2009; Waring *et al.,* 2014). Although there is significant uncertainty regarding the southern migratory stock's spatial movements, telemetry data indicates that the stock occupies waters of southern North Carolina (south of Cape Lookout) during the fall (October–December). In winter months (January–March), the stock moves as far south as northern Florida where it overlaps spatially with the northern Florida coastal and Jacksonville estuarine system stocks. In spring (April–June), the stock returns north to waters of North Carolina, and is presumed to remain north of Cape Lookout during the summer months. Therefore, the potential exists for harassment of southern migratory dolphins, most likely during the winter.

Western North Atlantic Coastal, Northern Florida—The Northern Florida Coastal Stock is delimited as the dolphins of the coastal morphotype inhabiting coastal waters from the shoreline to approximately the 200-m isobath from the Georgia/Florida border (30.7° N) south to 29.4° N (Figure 1). The northern and southern boundaries for this stock are provisional, as the spatial extent of this stock is poorly understood. During cold water months, this stock likely overlaps with the Southern Migratory Coastal Stock, which is thought to migrate south from waters of southern Virginia and north central North Carolina in the summer to waters south of Cape Fear and as far south as coastal Florida during winter months (Garrison *et al.,* 2017).

Jacksonville Estuarine System—The Jacksonville estuarine system (JES) stock has been defined as separate primarily by the results of photo-identification and genetic studies. The stock range is considered to be bounded in the north by the Georgia-Florida border at Cumberland Sound, extending south to approximately Jacksonville Beach, Florida. This encompasses an area defined during a photo-identification study of bottlenose dolphin residency patterns in the area (Caldwell, 2001), and the borders are subject to change upon further study of dolphin residency patterns in estuarine waters of southern Georgia and northern/central Florida. The habitat is comprised of several large brackish rivers, including the St. Johns River, as well as tidal marshes and shallow riverine systems. Three behaviorally different communities were identified during Caldwell's (2001) study: The estuarine waters north (Northern) and south (Southern) of the St. Johns River and the coastal area, all of which differed in density, habitat fidelity and social affiliation patterns. The coastal dolphins are believed to be members of a coastal stock, however (Waring *et al.,* 2014). Although Northern and Southern members of the JES stock show strong site fidelity, members of both groups have been observed outside their preferred areas. Dolphins residing within estuaries south of Jacksonville Beach down to the northern boundary of the Indian River Lagoon Estuarine System (IRLES) stock are currently not included in any stock, as there are insufficient data to determine whether animals in this area exhibit affiliation to the JES stock, the IRLES stock, or are simply transient animals associated with coastal stocks. Further research is needed to establish affinities of dolphins in the area between the ranges, as currently understood, of the JES and IRLES stocks.

All bottlenose dolphins stocks described above are susceptible to fisheries interactions, including those from trawls, hook and line, crab pot/traps, and gill nets and seine nets. Other sources of mortality include the morbillivirus which has been implicated in unusual mortality events (UMEs) for dolphins along the southeast coast of the United States. The amount of known serious injury and mortality from all sources are presented in Table 1 for each stock.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009). For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. One cetacean species is expected to potentially be affected by the specified activity. Bottlenose dolphins are classified as mid-frequency cetaceans.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take by Incidental Harassment* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take by Incidental Harassment* section, and the *Proposed Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

The effects of sounds from pile driving might result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2003; Nowacek *et al.,* 2007; Southall *et al.,* 2007). The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments, such as that at NAVSTA Mayport, are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (*e.g.,* sand and mud like at NAVSTA Mayport) would absorb or attenuate the sound more readily than hard substrates (*e.g.,* rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In general, the effects of sounds from pile driving might result in one or more of the following: Temporary or permanent threshold shift (TTS and PTS, respectively), non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.,* 1995; Gordon *et al.,* 2003; Nowacek *et al.,* 2007; Southall *et al.,* 2007). PTS and TTS is not anticipated in this case due to the fact all noise would be limited to the Mayport basin and the proposed mitigation and monitoring measures. Any harassment would likely be behavioral in nature. Exposure to pile driving noise can result in dolphin behavioral changes such as avoidance, changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding), and visible startle response or aggressive behavior (such as tail/fluke slapping). As reviewed in Southall *et al.* (2007, 2019), the severity of these reactions can range from mild to severe and the longevity of reactions can be temporary or long-term. Based on marine mammal monitoring data collected by the Navy during previous recapitalization projects involving pile driving (Navy 2016, 2018a, 2018b), dolphins behavior within and around the turning basin include foraging, traveling, and social behavior during and in absence of pile driving. No reactions attributed to pile driving noise are documented in those reports.

Masking may occur during the short periods of pile driving; however, this is unlikely to become biologically significant. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals, which utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were man-made, it could be potentially harassing if it disrupted hearing-related behavior. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to bottlenose dolphins, but the short-term duration and limited affected area would result in insignificant impacts from masking. In this case, pile driving durations are relatively short and no

significant habitat is located within NAVSTA Mayport. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory and impact pile driving, and which have already been taken into account in the exposure analysis.

Anticipated Effects on Habitat

The proposed activities at NAVSTA Mayport would not result in permanent impacts to habitats used directly by marine mammals as the new wall would be built within five ft of the existing wall, but may have potential short-term impacts to food sources such as forage fish and may affect acoustic habitat (see masking discussion above). There are no known foraging hotspots or other ocean bottom structure of significant biological importance to marine mammals present in the marine waters of the project area; however the surrounding areas may be foraging habitat for the dolphins. Therefore, the main impact issue associated with the proposed activity would be temporarily elevated sound levels and the associated direct effects on marine mammals, as discussed previously in this document. The most likely impact to marine mammal habitat occurs from pile driving effects on likely marine mammal prey (*i.e.,* fish) and minor impacts to the immediate substrate and water column (*e.g.,* elevated turbidity) during installation and removal of piles during the wharf construction project. The Mayport turning basin itself is a man-made basin with significant levels of industrial activity and regular dredging, and is unlikely to harbor significant amounts of forage fish. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to pile driving. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown—discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 decibels re 1 micoPascal root mean square (dB re 1 μPa rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

The Navy's proposed activity includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa rms are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's proposed activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the Table 3 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The Navy used results from previous sound source verification tests at NAVSTA Mayport to estimate vibratory pile driving source levels. Vibratory driving of steel sheet piles was monitored during the first year of construction at the nearby C–2 Wharf at NAVSTA Mayport during 2015. Measurements were conducted from a small boat in the turning basin and from the construction barge itself. Driving periods ranged from approximately 17 seconds to a little over one minute. Sound levels were recorded at a 10-m distance and the measured dB levels were converted to pressure values to generate 10-second averages of the levels before converting the values back to dB levels. The average and median of the levels resulted in a source level of 156 dB re 1µPa rms (Navy 2017).

No impact driving was conducted during this acoustic monitoring; therefore, the Navy relied on Caltrans (2015) to estimate source levels during impact pile driving of the 24-in sheet piles. The selected sound pressure levels used for modeling impact driving steel piles are 180 dB single-strike sound exposure level (SEL), 190 dB rms, and 205 dB peak. These values were also used in previous Navy Mayport IHAs without concern or public comment.

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources (such as pile driving), NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS. Inputs used in the User Spreadsheet and the resulting isopleths are reported below (Table 4).

Vibratory pile driving, in general, does have the potential to cause injury to marine mammals if the duration of activity and source level are such that the threshold for injury in mid-frequency cetaceans (198 dB SEL_{cum}) is exceeded. In this case, the duration is short enough and source level low enough to where a dolphin must be within less than 1m of the pile for the entire duration of activity (45 minutes per day); therefore, the potential for injury is discountable. Impact pile driving also has the potential to result in PTS; impact driving produces short, sharp pulses with higher peak levels than vibratory driving as well as sharp rise time to reach those peaks. However, the Navy is proposing to install only one pile per day (at 20 strikes per pile) resulting in very small isopleths (we note the peak threshold resulted in smaller isopleth that than the SEL threshold). As evident by the very small isopleths in Table 4, the potential for Level A harassment is discountable. As a result of this analysis, the Navy has not requested, nor is NMFS proposing to authorize, take by Level A harassment; therefore, it will not be discussed further.

TABLE 4—USER SPREADSHEET INPUT VALUES

User spreadsheet input	Impact pile driving	Vibratory pile driving
Spreadsheet Tab Used	E.1) Impact pile driving	A) Non-Impulse-Stat-Cont.
Source Level	180 dB SEL/205 dB peak	156 dBrms.
Weighting Factor Adjustment (kHz)	2	2.5.
b) Number of strikes per pile	20	N/A.
b) Number of piles per day	1	0.75 (15 piles × 3 minutes per pile).

TABLE 4—USER SPREADSHEET INPUT VALUES—Continued

User spreadsheet input	Impact pile driving	Vibratory pile driving
Propagation (xLogR)	15	15.
Distance of source level measurement (meters)*	10	10.
Level A Harassment Isopleth (mid-frequency cetaceans)	1.7 m	0.2 m.

To calculate the Level B harassment ensonified area, the Navy identified distances to the Level B harassment thresholds for impact and vibratory pile driving (160 dB rms and 120 dB rms, respectively) using a practical spreading loss model. Resulting isopleth distances and ensonified areas (corrected in ArcView GIS to eliminate land; see the Navy's application for more details) are presented in Table 5.

TABLE 5—LEVEL B HARASSMENT ISOPLETHS AND ENSONIFIED AREAS

Pile type	Driving method (source level)	Distance (m)	Area (km^2)
24″ Steel sheet piles	Vibratory (156 dB rms)	0.2	0.0002
		2,512	0.4104
	impact (190 dB rms)	1.7	0.0006
		1,000	0.3540

Marine Mammal Occurrence

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations.

Bottlenose dolphin density used for this analysis was based on surveys conducted to support wharf recapitalization projects within the Mayport turning basin (Navy, 2015). Those surveys demonstrated dolphin presence and abundance is not uniform throughout the year. Because it is unknown exactly when pile driving will commence and be completed within the effective period of the proposed IHA, the Navy applied the highest seasonal density of 4.15366 dolphins per km^2 to the estimated take analysis. This density has been used in previous IHAs issued to the Navy for wharf recapitalization projects within the Mayport turning basin without public comment or concern.

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate.

Bottlenose dolphin density was multiplied by the size of the relevant zone of influence and number of piles driven to determine the estimated number of Level B harassment exposures per day. Resulting vibratory and impact hammering exposures were summed across days to produce a total exposure estimate:

Exposure = (density × vibratory driving ensonified area × number of vibratory pile driving days) + (density × impact driving ensonified area × number of impact pile driving days).

The same methodology was used to estimate takes for work at Wharf Bravo, completed in 2017–18. During that project, two to three marine mammal observers were stationed strategically to cover the entire Level B harassment area. The number of detected takes for that project was only 30 percent of the number authorized; therefore, this method is considered reliable.

The Navy is requesting, and NMFS is proposing to authorize, 58 takes by Level B harassment incidental to vibratory and impact driving at the South Quay wall. The stocks from which these take could occur are provided in Table 1. Because it is not possible to distinguish stocks in the field, we assume all 58 takes could occur to any single stock. As described above, no Level A take is anticipated or authorized.

Proposed Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The Navy has proposed identical mitigation to that required in previous IHAs for work at NAVSTA Mayport, as described in detail in the draft IHA posted on NMFS' website at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* Pile driving will only be

conducted during daylight hours. For all pile driving, the Navy shall implement a minimum shutdown zone of 15-m radius around the pile and around any other in-water construction equipment. If a marine mammal approaches or enters the shutdown zone, all pile driving activities will be halted. If pile driving is halted or delayed due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal.

For all pile driving activities, a minimum of two protected species observers (PSOs) shall be on watch, with one positioned to achieve optimal monitoring of the shutdown zone and the second positioned to achieve optimal monitoring of monitoring (Level B harassment) zone. Observers may be stationed in a tall building at NAVSTA Mayport, the construction barge, small vessels, or on the wharf at a location that will provide adequate visual coverage for the marine mammal shutdown zone.

The Navy will use soft start techniques for impact pile driving. Soft start requires contractors to provide an initial set of strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized takes are met, is observed approaching or within the monitoring zone, pile driving and removal activities must shut down immediately using delay and shut-down procedures. Activities must not resume until the animal has been confirmed to have left the area or fifteen minutes have passed without re-detection of the animal.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Marine Mammal Monitoring

The Navy would conduct marine mammal monitoring using two NMFS-approved PSOs stationed at strategic locations at NAVSTA Mayport, per their Marine Mammal Monitoring Plan, dated April 2019. Monitoring will take place from 30 minutes prior to initiation of pile driving activity through thirty minutes post-completion of pile driving activity. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, their behavior shall be monitored and documented. No techniques (*e.g.,* pingers, boats) will be used to entice animals to leave the area. Monitoring shall occur throughout the time required to drive a pile and continue 30 minutes after pile driving ceases. The shutdown zone must be determined to be clear during periods of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

PSOs will be equipped with binoculars (7×50 power or greater) to ensure sufficient visual acuity and magnification while investigating sightings, portable radios or cellular phone(s) to rapidly communicate with the appropriate construction personnel to initiate shutdown of pile driving activity if required, a digital camera for photographing any marine species sighted, data collection forms, and a compass or GPS.

The Navy shall collect sighting data for marine mammal species observed in the region of activity during the period of activity. All observers shall be trained in marine mammal identification and behaviors, and shall have no other construction-related tasks while conducting monitoring.

PSOs will use approved data forms. Among other pieces of information, the Navy will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal(s), if any. In addition, the Navy will attempt to distinguish between the number of individual animals taken and the number of incidences of take.

Reporting

A draft report will be submitted to NMFS within 90 days of the completion of marine mammal monitoring, or sixty days prior to the requested date of issuance of any future IHA for projects at the same location, whichever comes first. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days, and will also provide descriptions of any behavioral responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions and an extrapolated total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within thirty days following resolution of comments on the draft report. Should the Navy encounter a dead or injured marine mammal, additional reporting procedures would be taken.

All specific monitoring and reporting requirements are available for review in the draft IHA (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities*).

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Pile driving activities associated with the South Quay Wall Recapitalization Project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated from pile driving. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving is happening.

No injury, serious injury, or mortality is anticipated given the nature of the activities and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is avoided through the construction methods and the implementation of the planned mitigation measures such that take by Level A harassment (injury), serious injury and mortality is not proposed to be authorized.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff 2006; HDR Inc. 2012). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are identical to previous NAVSTA Mayport recapilization projects, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences on bottlenose dolphins from behavioral harassment. In fact, marine mammal reports from previous projects requiring incidental harassment authorizations have found that the dolphins observed did not exhibit notable reactions attributed to pile driving noise at NAVSTA Mayport. In those reports (*e.g.,* Navy 2016, 2018a, 2018b), traveling and foraging behaviors were most common with no overt changes in behavior observed during pile driving.

Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. A very limited amount of pile driving would occur each day, making extended durations of exposure necessary to cause hearing impairment unlikely. Further, as described above, marine mammal monitoring reports indicate foraging behavior continues despite projects requiring the installation of several hundred piles. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in decrease in fitness for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment severity will also be reduced to the level of least practicable impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the turning basin while the activity is occurring. Finally, NAVSTA Mayport is a small, man-made military basin that does not include any significant marine mammal habitat or biologically important area.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality or injury is anticipated or authorized;
- Behavioral disturbance is possible, but expected to be minimal due to the limited duration of activities (no more than 35 days of pile driving during the proposed authorized year, the time required to drive each pile is brief (less than one hour of vibratory driving per day and no more than 20 impact strikes per day), and the proposed mitigation (*e.g.,* shut-downs and soft start) would reduce acoustic impacts to species in the area of activities; and
- The absence of any significant habitat within the project area, including known areas or features of special significance for foraging or reproduction.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Of the 58 incidents of behavioral harassment proposed for bottlenose dolphins, we have no information allowing us to parse the predicted incidents amongst the three stocks that may occur in the project area. Therefore, we assessed the total number of predicted incidents of take against the best abundance estimate for each stock, as though the total would occur for the stock in question. For the Florida Coastal and Southern Migratory Coastal stocks, total predicted number of incidents of take authorized would be

considered small at less than 5 percent and 1 percent, respectively.

The total number of authorized takes proposed for bottlenose dolphins of the Jacksonville Estuarine stock, if assumed to accrue solely to new individuals, is higher relative to current stock abundance compared to these two stocks at 14.07 percent. This assumes all 58 exposures occur to 58 individuals. This percentage is still relatively low and it is unlikely that all takes would occur to new individuals within this stock and this estimate all takes would occur to this one stock. Bottlenose dolphins belonging to estuarine stocks exhibit high site fidelity, resulting in higher likelihood of repeated exposure.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the Southeast Regional Protected Resources Division, whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Navy for conducting pile driving at NAVSTA Mayport from February 15, 2020, to February 14, 2021, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act*.

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this Notice of Proposed IHA for the proposed South Quay Wall Recapitalization Project. We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a one-year IHA renewal with an expedited public comment period (15 days) when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the proposed Renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take because only a subset of the initially analyzed activities remain to be completed under the Renewal); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: May 16, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–10550 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Telecommunications and Information Administration.

Title: NTIA Voluntary Collection of Broadband Availability Data.

OMB Control Number: None.

Form Number(s): None.

Type of Request: Regular submission.

Number of Respondents: 600.

Average Hours per Response: 53.

Burden Hours: 31,800.

Needs and Uses: In the Consolidated Appropriations Act of 2018, Congress directed NTIA to update the national broadband availability map in coordination with the Federal Communications Commission (FCC) and the states.[1] Specifically, Congress directed NTIA to acquire and display available third-party data sets to the extent it is able to negotiate its inclusion to augment data from the FCC, other federal government agencies, state governments, and the private sector.[2] The objective of these updates is to identify regions of the country with insufficient broadband capacity, particularly in rural areas.

Presently, the only source of nationwide broadband availability data is that collected from broadband service provider responses to the FCC Form 477 Fixed Broadband Deployment data process. Form 477 data are submitted by voice and broadband telecommunications service providers semi-annually and include information on the services each provider offers, at

[1] Consolidated Appropriations Act of 2018, Public Law 115–141, Division B, Title I, 132 Stat. 348.

[2] Joint Explanatory Statement, 164 Cong. Rec. No. 50—Book II, at H2084–85 (Mar. 22, 2018).

the Census block level. While the Census block system provides a very high level of geographic granularity overall—the United States is divided into over 11 million blocks, 95 percent of which do not exceed 1 square mile in land area—it is possible that broadband availability may vary within a single block, (which is most common in rural areas). Additionally, broadband service providers who wish to share more granular data on broadband availability—including regulated and non-regulated entities—have no mechanism to do so. Further, a broadband service provider offering service to any homes or businesses in a Census block is instructed to report that block as served in its Form 477 filing, even though it may not offer broadband services in most of the block. This can lead to overstatements in the level of broadband availability, especially in rural areas where Census blocks are large or when services are only available near the boundaries of a Census block.

As a result of these requirements and constraints, NTIA has developed this voluntary collection of broadband availability data, at a more granular level than that available via current Federal programs (including the FCC Form 477 process). This data will be used to analyze and map broadband availability across the country, and particularly in rural areas, for the purposes of public policy-making and public investment analysis and decision-making. This information collection covers the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Island Areas of American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the United States Virgin Islands.

The data to be collected includes geographic information on service availability—such as address, address range, road centerline, land-parcel identification, or latitude/longitude—and corresponding broadband availability data (such as technology service type, upload and download speed, etc.) Data in a Geographic Information Systems (GIS) format that describe (a) wireless coverage areas based on a propagation model and (b) network infrastructure (such as fiber optic routes) is also responsive. The information collection will be administered through an online file transfer tool. NTIA will not require that respondents modify appropriate data sets, with the exception that Personally Identifiable Information (PII) should be removed prior to transmission to NTIA.

Affected Public: NTIA intends to collect this information from two types of respondents that collect broadband data with more geographic granularity than the Census block level: (1) Owners and operators of broadband networks; and (2) industry associations, data aggregators, and researchers that study or analyze broadband availability. Respondents may include private companies, non-profits, cooperatives, educational institutions, tribal governments, and local, regional, or state governments. This information collection includes the use of both wireline and wireless technologies to deliver broadband services.

Frequency: Bi-annual. Recognizing the regulatory requirements and deadlines of broadband service providers, NTIA has aligned the due dates for this information collection to trail the bi-annual FCC Form 477 reporting submitted by service providers. Data should be submitted to NTIA on November 1 and May 1 of each year. While NTIA intends to collect information twice a year on these dates, NTIA's online system will not foreclose an entity from submitting information at any other time during the year or more than twice a year if the entity voluntarily chooses to do so.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at *reginfo.gov.* Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Sheleen Dumas,

Departmental Lead PRA Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2019–10506 Filed 5–20–19; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Software Licensing Availability

AGENCY: Air Force Research Laboratory Information Directorate, Rome, New York, Department of the Air Force, DoD.

ACTION: Notice of availability to license software.

SUMMARY: Under the 2014 National Defense Authorization Act, the Department of the Air Force announces the availability of DATA SCULPTOR VERSION 1 AND DATA SCULPTOR VERSION 2 SOURCE CODE AND SOFTWARE DOCUMENTATION (collectively ''Software'') for non-exclusive, partially exclusive, and exclusive field of use licensing of any right, title and interest the United States Air Force has therein.

FOR FURTHER INFORMATION CONTACT: Written inquiries should be sent to: Stephen Colenzo, Air Force Research Laboratory, Office of Research and Technology Applications (ORTA), AFRL/RIBA, 26 Electronic Parkway, Rome, New York 13441–4514. Telephone: (315) 330–7665. Electronic inquiries should be sent to *stephen.colenzo@us.af.mil.*

Carlinda N. Lotson,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2019–10435 Filed 5–20–19; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Military Family Readiness Council; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Department of Defense Military Family Readiness Council will take place.

DATES: Thursday, June 13, 2019 from 10:00 a.m. to 12:00 p.m.

ADDRESSES: Pentagon, 1155 Defense Pentagon, PLC2 Pentagon Library & Conference Center, Room B6, Washington, DC 20301.

FOR FURTHER INFORMATION CONTACT: William Story, (571) 372–5345 (Voice), (571) 372–0884 (Facsimile), OSD Pentagon OUSD P–R Mailbox Family Readiness Council, *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil* (Email). Mailing address is: Office of the Deputy Assistant Secretary of Defense (Military Community & Family Policy), Office of Family Readiness Policy, 4800 Mark Center Drive, Alexandria, VA 22350–2300, Room 3G15. Website: *https://www.militaryonesource.mil/leaders-service-providers/military-family-readiness-council.*

SUPPLEMENTARY INFORMATION: This meeting is being held under the

provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: This is the third meeting of the Council for Fiscal Year 2019 (FY2019). During this meeting the Council Members will present, deliberate, and vote on recommendations for FY2019 and focus areas for FY2020.

Agenda: Opening Remarks, Administrative Items, Review of Written Submissions, Council Member Presentations, Deliberations and Voting, Closing Remarks. Note: Exact order may vary.

Meeting Accessibility: Members of the public who are interested in attending this meeting must RSVP online to: *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil* no later than Thursday, May 30, 2019. Meeting attendee RSVPs should indicate if an escort is needed to the meeting location (non-CAC Card holders need an escort) and if handicapped accessible transportation is needed. All visitors without CAC cards who are attending the MFRC must pre-register prior to entering the Pentagon. RSVPs to the MFRC mailbox needing escort to the meeting will be contacted by email from the Pentagon Force Protection Agency (PFPA) with instructions for registration. Please follow these instructions carefully. Otherwise, members of the public may be denied access to the Pentagon on the day of the meeting. Members of the public who are approved for Pentagon access should arrive at the Pentagon Visitors Center waiting area (Pentagon Metro Entrance) no later than 9:00 a.m. on the day of the meeting to allow time to pass through security check points and be escorted to the meeting location. Contact Eddy Mentzer, (571) 372–0857 (Voice), (571) 372–0884, (Facsimile) if you have any questions about your RSVP.

Written Statements: Persons interested in providing a written statement for review and consideration by Council members attending the June 13, 2019 meeting must do so no later than close of business Thursday, May 30, 2019, through the Council mailbox (*osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil*). Written statements received after this date will be provided to Council members in preparation for the next MFRC meeting. The Designated Federal Officer (DFO) will review all timely submissions and ensure submitted written statements are provided to Council members prior to the meeting that is subject to this notice. Written statements must not be longer than two type-written pages and should address the following details: Issue or concern, discussion, and a recommended course of action. Those who make submissions are requested to avoid including personally identifiable information (PII) such as names of adults and children, phone numbers, addresses, social security numbers and other contact information within the body of the written statement. Links or supporting documentation may also be included, if necessary, to provide brief appropriate historical context and background information.

Dated: May 16, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–10592 Filed 5–20–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2019–HA–0029]

Submission for OMB Review; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: 30-Day information collection notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by June 20, 2019.

ADDRESSES: Comments and recommendations on the proposed information collection should be emailed to Mr. John Brammer, DoD Desk Officer, at *oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer, Docket ID number, and title of the information collection.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: TRICARE Prime Enrollment, Disenrollment, and Primary Care Manager (PCM) Change Form; DD Form 2876; OMB Control Number 0720–0008.

Type of Request: Extension.

Number of Respondents: 1,520,050.

Responses per Respondent: 2.

Annual Responses: 3,040,100.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 760,025 hours.

Needs and Uses: The information collection requirement is necessary to obtain the TRICARE beneficiary's personal information needed to: (1) Complete his/her enrollment into TRICARE Prime health plan, (2) change the beneficiary's enrollment (new Primary Care Manager, enrolled region, add/drop a dependent, etc.), or (3) disenroll the beneficiary. All TRICARE beneficiaries have the option of enrolling, changing their enrollment or dis-enrolling using the DD Form 2876, the Beneficiary Web Enrollment (BWE) portal, or by calling their regional Managed Care Support Contractor (MCSC). Although the telephonic enrollment/change is the preferred method by the large majority of beneficiaries, many beneficiaries prefer using the form to document their enrollment date and preferences.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Josh Brammer.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: May 15, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–10524 Filed 5–20–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

National Security Education Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the National Security Education Board will take place.

DATES: Open to the public Monday, June 10, 2019 from 10:30 a.m. to 4:00 p.m.

ADDRESSES: The address of the meeting is the Mayflower Hotel, 1127 Connecticut Avenue NW, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Michael Nugent, (571) 256–0702 (Voice), (703) 692–2615 (Facsimile), *michael.a.nugent22.civ@mail.mil* (Email). Mailing address is National Security Education Program, 4800 Mark Center Drive, Suite 08F09–02, Alexandria, VA 22350–7000. Website: *https://www.nsep.gov/content/national-security-education-board.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to review and make recommendations to the Secretary of Defense concerning requirements established by the David L. Boren National Security Education Act, Title VII of Public Law 102–183, as amended.

Agenda: 10:30 a.m.—National Security Education Board (NSEB) Full Meeting Begins. 10:45 a.m.—National Security Education Program (NSEP) Program Discussion. 11:30 a.m.—Serving the Needs of the National Security Community: Perspectives from Borens Working in Intelligence. 12:45 p.m.—Working Lunch with Boren Scholars and Fellows. 2:00 p.m.—Class of 2019 Boren Scholars and Fellows. 2:30 p.m.—New Directions in Language Programming. 3:30 p.m.—Board Discussion. 4:00 p.m.—Adjourn.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

Written Statements: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150. Pursuant to 102–3.140 and sections 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Department of Defense National Security Education Board about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of the planned meeting. All written statements shall be submitted to the Designated Federal Official for the National Security Education Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Official can be obtained from the GSA's FACA Database—*http://facadatabase.gov/.* Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Official at the address listed in the **FOR FURTHER INFORMATION CONTACT** section at least five calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the National Security Education Board until its next meeting.

Dated: May 16, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–10585 Filed 5–20–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Environmental Impact Statement Withdrawal and Notice of Intent of an Environmental Assessment for the New York and New Jersey Harbor Anchorages General Reevaluation Report

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of withdrawal of an environmental impact statement; notice of intent of an environmental assessment.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA), on November 1, 2018, the Norfolk District, U.S. Army Corps of Engineers (Corps) initiated the Environmental Impact Statement (EIS) process to identify and analyze potential impacts associated with risk management measures as a part of the Federal feasibility study for the New York and New Jersey Harbor Anchorages. Currently, the Corps has identified a Tentatively Selected Plan (TSP) that includes a modification of a single anchorage within Gravesend Bay, expanding it to 3,600 feet and 50 feet in depth, to improve the safety and efficiency of port operations. Preliminary analysis of the TSP indicates no significant impacts are expected, therefore the Corps is terminating the EIS process and is withdrawing the Notice of Intent published in the Thursday, November 1, 2018 issue of the **Federal Register**. Instead, an Environmental Assessment (EA) will be prepared. It is anticipated that a draft of the integrated General Reevaluation Report and Environmental Assessment (GRR/EA) will be available for a 30-day public comment period beginning later in 2019.

ADDRESSES: Mr. David Schulte, Department of the Army, U.S. Army Corps of Engineers, Norfolk District, Fort Norfolk, 803 Front St., Norfolk, VA 23510 or via email: *David.M.Schulte@usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: David Schulte, (757) 201–7007.

SUPPLEMENTARY INFORMATION: Applicable laws and regulations are section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4321–4370, as implemented by the Council on Environmental Quality Regulations (40 CFR parts 1500–1508). The primary problem is that existing Federal anchorages in the harbor are insufficient in meeting the variety of functions (ex. security and U.S. Coast Guard inspections, lightering, bunkering/refueling, waiting areas, and emergency ''bailout'' areas) they are used for as part of normal harbor operations, which reduces vessel safety and cargo transportation efficiency. Multiple issues have been identified by key harbor users and stakeholders. There is not enough anchorage area to accommodate all of the vessels that need to anchor for various reasons. The dimensions of existing anchorages cannot accommodate vessels larger than 1,100 foot LOA (length overall) which is a significant portion of the vessels that regularly call on the harbor and

anchored vessels regularly swing out into the navigation channel. Vessels are currently forced to wait outside the harbor in the ocean due to a lack of anchorage availability and/or anchorage areas designed for larger vessels.

The Corps is the lead federal agency and the Port Authority of New York and New Jersey will be the non-federal sponsor for the study. The GRR will address the primary problem of the New York and New Jersey Harbor Anchorages by studying all reasonable alternatives and determine the Federal interest in cost-sharing for those alternatives. A TSP has been identified which involves the modification of a single anchorage at Gravesend Bay, increasing its size to 3,600 feet and 50 feet in depth from its present dimensions.

As required by Council on Environmental Quality's Principles, Requirements and Guidelines for Water and Land Related Resources Implementation Studies all reasonable alternatives to the proposed Federal action that meet the purpose and need will be considered in the EA. These alternatives will include no action and a range of reasonable alternatives for improving navigation in the New York & New Jersey Harbor Anchorages.

Scoping/Public Involvement. A public NEPA scoping meeting was held on November 8, 2018, from 5 p.m.–8 p.m. It was held at the GSA Building, conference rooms 1–3 on the 30th floor, at 290 Broadway, New York, NY 10007. Federal, state, and local agencies, Indian tribes, and the public were invited to provide scoping comments to identify issues and potentially significant effects to be considered in the analysis. Comments on the proposed project can still be accepted until the end of the 30-day public coordination period, which is expected to occur later in 2020. The draft GRR/EA will be made available for a 30-day public comment period that will be scheduled for later in 2019.

Dated: May 14, 2019.

David Schulte,

Regional Technical Specialist, USACE, Norfolk District.

[FR Doc. 2019–10571 Filed 5–20–19; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0032]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Assessment of Educational Progress (NAEP) 2019 and 2020 Long-Term Trend (LTT) Update

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 20, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0032. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9089, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kashka Kubzdela, 202–245–7377 or email *NCES.Information.Collections@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Assessment of Educational Progress (NAEP) 2019 and 2020 Long-Term Trend (LTT) Update.

OMB Control Number: 1850–0928.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 642,087.

Total Estimated Number of Annual Burden Hours: 322,765.

Abstract: The National Assessment of Educational Progress (NAEP), conducted by the National Center for Education Statistics (NCES), is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, technology and engineering literacy (TEL), and the arts. The National Assessment of Educational Progress Authorization Act (Pub. L. 107–279 Title III, section 303) requires the assessment to collect data on specified student groups and characteristics, including information organized by race/ethnicity, gender, socio-economic status, disability, and limited English proficiency. It requires fair and accurate presentation of achievement data and permits the collection of background, noncognitive, or descriptive information that is related to academic achievement and aids in fair reporting of results. The intent of the law is to provide representative sample data on student achievement for the nation, the states, and subpopulations of students and to

monitor progress over time. The nature of NAEP is that burden alternates from a relatively low burden in national-level administration years to a substantial burden increase in state-level administration years when the sample has to allow for estimates for individual states and some of the large urban districts. The request to conduct NAEP 2019 and 2020 was approved in September 2018 with the latest change request approved in February 2019 (OMB #1850–0928 v.10–13). NAEP 2019 is currently underway. This request, which was approved in April 2019 (OMB #1850–0928 v.14) under the 44 U.S.C. 3507(j)(1) (''emergency clearance''), is to update the approved NAEP 2020 plan with: (1) The cancellation of all of the NAEP pilot and special studies originally planned for the 2019–20 school year (NAEP 2020), and (2) based on a Congressional request, the administration of Long Term Trend (LTT) assessment during the 2019–20 school year. The LTT assessments are based on nationally representative samples of 9-, 13-, and 17-year olds, and have been used by NAEP since the early 1970s to provide measures of students' educational progress over long time periods to allow for analyses of national trends in students' performance in mathematics and reading.

Dated: May 15, 2019.

Stephanie Valentine,

PRA Clearance Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–10501 Filed 5–20–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0027]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Recruitment and Field Test

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 20, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0027. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9089, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Kashka Kubzdela, 202–245–7377 or email *NCES.Information.Collections@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: High School and Beyond 2020 (HS&B:20) Base-Year Full-Scale Study Recruitment and Field Test.

OMB Control Number: 1850–0944.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 53,503.

Total Estimated Number of Annual Burden Hours: 35,635.

Abstract: The High School and Beyond 2020 study (HS&B:20) will be the sixth in a series of longitudinal studies at the high school level conducted by the National Center for Education Statistics (NCES), within the Institute of Education Sciences (IES) of the U.S. Department of Education. HS&B:20 will follow a nationally-representative sample of ninth grade students from the start of high school in the fall of 2020 to the spring of 2024 when most will be in twelfth grade. The study sample will be freshened in 2024 to create a nationally representative sample of twelfth-graders. A high school transcript collection and additional follow-up data collections beyond high school are also planned. The NCES secondary longitudinal studies examine issues such as students' readiness for high school; the risk factors associated with dropping out of high school; high school completion; the transition into postsecondary education and access/choice of institution; the shift from school to work; and the pipeline into science, technology, engineering, and mathematics (STEM). They inform education policy by tracking long-term trends and elucidating relationships among student, family, and school characteristics and experiences. HS&B:20 will follow the Middle Grades Longitudinal Study of 2017/18 (MGLS:2017) which followed the Early Childhood Longitudinal Study, Kindergarten Class of 2010–11 (ECLS–K:2011), thereby allowing for the study of all transitions from elementary school through high school and into higher education and/or the workforce. HS&B:20 will include surveys of students, parents, students' math teachers, counselors, and administrators, plus a student assessment in mathematics and reading and a brief hearing and vision test. In preparation for the HS&B:20 base-year full scale study, scheduled to take place in the fall of 2020, this request is to conduct the HS&B:20 base year field test data collection and the base year full scale sampling and state, school district,

school, and parent recruitment activities, both scheduled to begin in the fall of 2019. These activities include collecting student rosters and selecting the base-year full scale sample. Approval for the base-year field test recruitment activities was received in December 2018 (OMB #1850–0944 v.1). Approval for the base-year full scale study data collection will be requested in a separate submission in early 2020.

Dated: May 15, 2019.

Stephanie Valentine,

PRA Clearance Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–10500 Filed 5–20–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2018–ICCD–0133]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Assessing Evidence of Effectiveness in Adult Education

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before June 20, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0133. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9089, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Melanie Ali, 202–245–8345.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Assessing Evidence of Effectiveness in Adult Education.

OMB Control Number: 1850–NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 60.

Total Estimated Number of Annual Burden Hours: 27.

Abstract: Title II of the Workforce Innovation and Opportunity Act (WIOA) of 2014 mandates a National Assessment of Adult Education. As part of the assessment, ED is conducting a feasibility study to determine whether specific adult education approaches could be rigorously evaluated at this time. If such approaches are identified, ED may elect to conduct effectiveness studies in a subsequent phase of the national assessment.

The feasibility study, which is the focus of this clearance package, will draw on interviews with directors of WIOA-funded adult education programs that currently implement, or that could implement, one of a number of approaches that ED has prioritized. If any of the proposed studies proceed, revised clearance packages will be submitted for data collections not covered under this request.

Dated: May 15, 2019.

Stephanie Valentine,

PRA Clearance Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–10499 Filed 5–20–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0024]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; EZ-Audit: Electronic Submission of Financial Statements and Compliance Audits

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before June 20, 2019.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0024. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance

Division, U.S. Department of Education, 550 12th Street SW, PCP, Room 9086, Washington, DC 20202–0023.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: EZ-Audit: Electronic Submission of Financial Statements and Compliance Audits.

OMB Control Number: 1845–0072.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 6,100.

Total Estimated Number of Annual Burden Hours: 2,491.

Abstract: eZ-Audit is a web-based process designed to facilitate the submission of compliance and financial statement audits, expedite the review of those audits by the Department, and provide more timely and useful information to public, non-profit and proprietary institutions regarding the Department's review. eZ-Audit establishes a uniform process under which all institutions submit directly to the Department any audit required under the Title IV, HEA program regulations. eZ-Audit continues to have minimal number of financial template line items and general information questions. There has been no change to the form or method of submission.

Dated: May 15, 2019.

Kate Mullan,

PRA Coordinator, Information Collection Clearance Program, Information Management Branch, Office of the Chief Information Officer.

[FR Doc. 2019–10484 Filed 5–20–19; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of Guidance and Application for Hydroelectric Incentive Program

AGENCY: Water Power Technologies Office, Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of availability of guidance and open application period.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of updated guidance for the Energy Policy Act of 2005 program. The guidance describes the hydroelectric incentive payment requirements and explains the type of information that owners or authorized operators of qualified hydroelectric facilities must provide DOE when applying for hydroelectric incentive payments. This incentive is available for electric energy generated and sold for a specified 10-year period as authorized under the Energy Policy Act of 2005. In Congressional appropriations for Federal fiscal year 2019, DOE received funds to support this hydroelectric incentive program. At this time, DOE is only accepting applications from owners and authorized operators of qualified hydroelectric facilities for hydroelectricity generated and sold in calendar year 2018.

DATES: DOE is currently accepting applications from May 21, 2019 through June 20, 2019. Applications must be sent to *hydroincentive@ee.doe.gov* by midnight EDT, June 20, 2019, or they will not be considered timely filed for calendar year 2018 incentive payments.

ADDRESSES: Interested parties are to submit applications electronically to: *hydroincentive@ee.doe.gov*. DOE's guidance is available at: *https://www.energy.gov/eere/water/water-power-funding-opportunities*.

FOR FURTHER INFORMATION CONTACT: Questions may be addressed to Corey Vezina, U.S. Department of Energy, Golden Field Office, 15013 Denver West Parkway, Golden, CO 80401, (240) 562–1382 or by email at: *hydroincentive@ee.doe.gov*. Further instruction can be found in the guidance posted at: *https://www.energy.gov/eere/water/water-power-funding-opportunities. Electronic communications are recommended for correspondence and required for submission of application information.*

SUPPLEMENTARY INFORMATION: In the Energy Policy Act of 2005 (EPAct 2005; Pub. L. 109–58), Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. Under Section 242 of EPAct 2005, the Secretary of Energy is directed to provide incentive payments to the owner or authorized operator of qualified hydroelectric facilities for energy generated and sold by a qualified hydroelectric facility for a specified 10-year period (*See* 42 U.S.C. 15881). The 2019 Consolidated Appropriations Act authorized funding for the Section 242 program for conventional hydropower under EPAct 2005. In FY 2019, DOE allocated $6.6M for this purpose.

Recently DOE made minor updates to clarify its Guidance for the Energy Policy Act of 2005 Section 242. The April 2019 Guidance is available at: *https://www.energy.gov/eere/water/water-power-funding-opportunities*. Each application will be reviewed based on the Guidance. The majority of the Guidance changes were minor and involved edits such as consistently referring to the facilities at issue as ''hydroelectric generation facility'' or moving existing Guidance to a different portion of the Guidance to improve clarity. For example, the ''Added'' definition was formerly contained in the ''Qualified hydroelectric facility'' definition but is now a standalone definition.

The description of how DOE calculates incentive payments was moved from the ''Qualified-kilowatt-hours (kWh)'' definition to a new ''Payment Calculation'' and equation in Section V. This section and equation reflect how DOE has been calculating incentive payments since the Department started receiving appropriations for this program and was added to the Guidance this year to increase transparency. The Guidance clarifies that the inflation adjustment required at 42 U.S.C. 15881(e)(2) is made in accordance with data similar to that used by the Internal Revenue Service in its annual Publications of Inflation Adjustment Factor and Reference Prices for other code sections

of the Internal Revenue Code. Also under Section V., the Guidance now provides three hypothetical examples to explain when hydroelectric generation facility production would be eligible for incentive payments based on statutory date requirements.

Section VI. includes a clarification that applications for each incentive period must be properly completed and submitted to DOE each year and cannot simply refer to an application from a previous year. Section VI. removes the application requirement that applicants notify DOE at least six months before a facility is expected to be first used. In Section VII., the Guidance states that an appeal may be dismissed for any reason that an appeal would be subject to dismissal under Office of Hearings and Appeals procedural regulations at 10 CFR part 1003. Finally, in Section VII. OHA grants DOE an opportunity to submit a written response to an appeal and allows the appellant the opportunity to reply to DOE's response.

DOE notes that applicants that received incentive payments for prior calendar years must submit a full application addressing all eligibility requirements for hydroelectricity generated and sold in calendar year 2018. DOE will not consider previously submitted application materials. Applications that refer to previous application materials or statements in lieu of submitting current information will not be considered. As authorized under Section 242 of EPAct 2005, and as explained in the Guidance, DOE also notes that it will only accept applications from qualified hydroelectric facilities that began operations at an existing dam or conduit during the inclusive period beginning October 1, 2005, and ending on September 30, 2015. Therefore, although DOE is accepting applications for full calendar year 2018 production, the qualified hydroelectric facility must have begun operations starting October 1, 2005, through September 30, 2015, for DOE to consider the application.

When submitting information to DOE for Section 242 program, it is recommended that applicants carefully read and review the completed content of the Guidance for this process. When reviewing applications, DOE may corroborate the information provided with information that DOE finds through FERC e-filings, contact with power off-taker, and other due diligence measure carried out by reviewing officials. DOE may require the applicant to conduct and submit an independent audit at its own expense, or DOE may conduct an audit to verify the number of kilowatt-hours claimed to have been generated and sold by the qualified hydroelectric facility and for which an incentive payment has been requested or made.

Signed in Washington, DC, on April 30, 2019.

Steve Chalk,

Acting Deputy Assistant Secretary for Renewable Power, Energy Efficiency and Renewable Energy.

[FR Doc. 2019–10572 Filed 5–20–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

U.S. Energy Information Administration

Agency Information Collection Proposed New Survey OR Extension

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: EIA is requesting a three-year extension, without changes, of the *Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.* This generic clearance enables EIA to collect customer and stakeholder feedback from the public on service delivery in an efficient and timely manner to ensure that EIA's programs effectively meet our customers' needs and to collect feedback on improving service delivery to the public.

DATES: EIA must receive all comments on this proposed information collection no later than July 22, 2019. If you anticipate any difficulties in submitting your comments by the deadline, contact the person listed in the **ADDRESSES** section of this notice as soon as possible.

ADDRESSES: Mail comments to Jacob Bournazian, U.S. Energy Information Administration, 1000 Independence Avenue SW, EI–21, Washington, DC 20585.

Submit comments electronically to *jacob.bournazian@eia.gov.*

FOR FURTHER INFORMATION CONTACT: If you need additional information, send your request to Jacob Bournazian, U.S. Energy Information Administration, telephone: (202) 586–5562, email at *jacob.bournazian@eia.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.* 1905–0210;

(2) *Information Collection Request Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery;

(3) *Type of Request:* Renewal;

(4) *Purpose:* The solicitation of feedback on Agency Service Delivery includes topics such as: Timeliness of publishing, understanding of questions and terminology used in EIA products, perceptions on data confidentiality and security, appropriateness and relevancy of information published, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses are assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the agency's services will be unavailable. The agency will only submit an information collection for approval under this generic clearance if it meets the following conditions: It is voluntary; it has a low burden for respondents; is low-cost for both the respondents and the Federal Government; is noncontroversial and does not raise issues of concern to other Federal agencies; is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future; Personally Identifiable Information (PII) may be collected, if the need arises, PII is collected only to the extent necessary to initially contact respondents and is not retained. The information gathered is intended only to be used internally for general service improvement, the design, modification, and evaluation of survey instruments, modes of data collection, and program management purposes.

Advances in technology and service delivery systems in the private sector, have increased the public's expectations of the Government's customer service promise. The agency must also address the need to improve its services, not only to individuals, but also to private and Governmental entities to which the agency directly provides significant services to keep pace with the public's expectations of the Government. Government managers must identify and learn from what is working in the private sector and apply these best practices to deliver services better, faster, and at lower cost. Such best practices include increasingly popular lower-cost, self-service options accessed by the internet or mobile phone and improved processes that deliver services faster and more responsively, reducing the overall need for customer inquiries and complaints. The Federal Government has a responsibility to streamline and make more efficient its

service delivery to better serve the public.

(5) *Annual Estimated Number of Respondents:* 80,600.

(6) *Annual Estimated Number of Total Responses:* 80,600.

(7) *Annual Estimated Number of Burden Hours:* 8,446.

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $625,173.00.

Comments are invited on whether or not: (a) The proposed collection of information is necessary for the proper performance of agency functions, including whether the information will have a practical utility; (b) EIA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used, is accurate; (c) EIA can improve the quality, utility, and clarity of the information it will collect; and (d) EIA can minimize the burden of the collection of information on respondents, such as automated collection techniques or other forms of information technology.

Statutory Authority: E.O. 12862, Setting Customer Service Standards, E.O. 13571, Streamlining Service Delivery and Improving Customer Service.

Signed in Washington, DC, on May 16, 2019.

Nanda Srinivasan,

Director, Office of Survey Development and Statistical Integration, U.S. Energy Information Administration.

[FR Doc. 2019–10560 Filed 5–20–19; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–97–000.
Applicants: Blossburg Power, LLC.
Description: Self-Certification of EG of Blossburg Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5041.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–98–000.
Applicants: GenOn Holdco 1, LLC.
Description: Self-Certification of EG of GenOn Holdco 1, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5042.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–99–000.
Applicants: GenOn Holdco 2, LLC.
Description: Self-Certification of EG of GenOn Holdco 2, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5043.
Comments Due: 5 p.m. ET 6/5/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2437–012.
Applicants: Arizona Public Service Company.
Description: Second Supplement to December 28, 2018 Triennial Market Power Update of Arizona Public Service Company.
Filed Date: 5/14/19.
Accession Number: 20190514–5179.
Comments Due: 5 p.m. ET 6/4/19.

Docket Numbers: ER19–1839–000.
Applicants: Imperial Valley Solar 3, LLC.
Description: § 205(d) Rate Filing: Imperial Valey Solar 3, LLC Cost True-Up Amendment to be effective 5/15/2019.
Filed Date: 5/14/19.
Accession Number: 20190514–5131.
Comments Due: 5 p.m. ET 6/4/19.

Docket Numbers: ER19–1840–000.
Applicants: Imperial Valley Solar 3, LLC.
Description: Baseline eTariff Filing: Imperial Valey Solar 3, LLC Substation Facilities Agreement to be effective 5/15/2019.
Filed Date: 5/14/19.
Accession Number: 20190514–5132.
Comments Due: 5 p.m. ET 6/4/19.

Docket Numbers: ER19–1841–000.
Applicants: PacifiCorp.
Description: § 205(d) Rate Filing: Tri-State Master Install, O&M Agmt for Metering (Rev 1) to be effective 7/14/2019.
Filed Date: 5/14/19.
Accession Number: 20190514–5140.
Comments Due: 5 p.m. ET 6/4/19.

Docket Numbers: ER19–1842–000.
Applicants: GenOn Power Midwest, LP.
Description: § 205(d) Rate Filing: Reactive Supply Service Tariff Revision to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5002.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1843–000.
Applicants: GenOn REMA, LLC.
Description: Tariff Cancellation: Notice of Cancellation of Rate Schedule to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5003.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1844–000.
Applicants: GenOn Holdco 1, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5004.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1845–000.
Applicants: GenOn Holdco 2, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5005.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1846–000.
Applicants: GenOn Holdco 3, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5006.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1847–000.
Applicants: GenOn Holdco 4, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5007.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1848–000.
Applicants: GenOn Holdco 5, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5008.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1849–000.
Applicants: GenOn Holdco 6, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5009.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1850–000.
Applicants: GenOn Holdco 7, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5010.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1851–000.
Applicants: GenOn Holdco 8, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5011.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1852–000.
Applicants: Orrtanna Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5012.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1853–000.
Applicants: Shawnee Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5013.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1854–000.
Applicants: Titus Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5014.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1855–000.
Applicants: Hamilton Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5015.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1856–000.
Applicants: Blossburg Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5016.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1857–000.
Applicants: Hunterstown Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5017.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1858–000.
Applicants: Tolna Power, LLC.
Description: Baseline eTariff Filing: New Baseline Reactive Tariff Filing to be effective 12/31/9998.
Filed Date: 5/15/19.
Accession Number: 20190515–5018.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1859–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 2891R5 AECC, Entergy Arkansas and MISO Attachment AO to be effective 5/13/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5020.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1860–000.
Applicants: Imperial Valley Solar 1, LLC.
Description: § 205(d) Rate Filing: COC Exhibit D CSOLAR IV South to be effective 5/16/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5030.
Comments Due: 5 p.m. ET 6/5/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 15, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–10532 Filed 5–20–19; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC19–91–000.
Applicants: GenOn Power Midwest, LP, GenOn REMA, LLC, GenOn Holdco 1, LLC, GenOn Holdco 2, LLC, GenOn Holdco 3, LLC, GenOn Holdco 4, LLC, GenOn Holdco 5, LLC, GenOn Holdco 6, LLC, GenOn Holdco 7, LLC, GenOn Holdco 8, LLC, Orrtanna Power, LLC, Shawnee Power, LLC, Titus Power, LLC, Hamilton Power, LLC, Blossburg Power, LLC, Niles Power, LLC, Hunterstown Power, LLC, Tolna Power, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act, *et al.,* of GenOn Power Midwest, LP, *et al.*
Filed Date: 5/15/19.
Accession Number: 20190515–5066.
Comments Due: 5 p.m. ET 6/5/19.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG19–100–000.
Applicants: GenOn Holdco 3, LLC.
Description: Self-Certification of EG of GenOn Holdco 3, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5044.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–101–000.
Applicants: GenOn Holdco 4, LLC.
Description: Self-Certification of EG of GenOn Holdco 4, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5045.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–102–000.
Applicants: GenOn Holdco 5, LLC.
Description: Self-Certification of EG of GenOn Holdco 5, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5046.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–103–000.
Applicants: GenOn Holdco 6, LLC.
Description: Self-Certification of EG of GenOn Holdco 6, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5047.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–104–000.
Applicants: GenOn Holdco 7, LLC.
Description: Self-Certification of EG of GenOn Holdco 7, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5050.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–105–000.
Applicants: GenOn Holdco 8, LLC.
Description: Self-Certification of EG of GenOn Holdco 8, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5051.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–106–000.
Applicants: Hamilton Power, LLC.
Description: Self-Certification of EG of Hamilton Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5052.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–107–000.
Applicants: Hunterstown Power, LLC.
Description: Self-Certification of EG of Hunterstown Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5053.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–108–000.
Applicants: Niles Power, LLC.
Description: Self-Certification of EG of Niles Power, LLC under.
Filed Date: 5/15/19.
Accession Number: 20190515–5054.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–109–000.
Applicants: Orrtanna Power, LLC.
Description: Self-Certification of EG of Orrtanna Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5055.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–110–000.
Applicants: Shawnee Power, LLC.
Description: Self-Certification of EG of Shawnee Power, LLC.

Filed Date: 5/15/19.
Accession Number: 20190515–5056.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–111–000.
Applicants: Titus Power, LLC.
Description: Self-Certification of EG of Titus Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5057.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: EG19–112–000.
Applicants: Tolna Power, LLC.
Description: Self-Certification of EG of Tolna Power, LLC.
Filed Date: 5/15/19.
Accession Number: 20190515–5058.
Comments Due: 5 p.m. ET 6/5/19.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–1139–001.
Applicants: Indiana Michigan Power Company, Kentucky Power Company, AEP Generation Resources Inc., AEP Energy Partners, Inc., Kingsport Power Company, Wheeling Power Company, Appalachian Power Company.
Description: Compliance filing: MBR AEP Operating Companies Market Based Rates Tariff to be effective 3/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5159.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1140–001.
Applicants: AEP Energy Partners, Inc., AEP Generation Resources Inc., AEP Texas Inc., Southwestern Electric Power Company, Public Service Company of Oklahoma.
Description: Compliance filing: Market-Based Rates Tariff to be effective 3/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5129.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1861–000.
Applicants: Kansas City Power & Light Company, Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: KCP&L Formula Rate Revisions to Modify Depreciation Rates to be effective 1/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5094.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1862–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2019–05–15_SA 3163 Termination of ATC–WPS Project Commitment Agmt (Plover) to be effective 5/16/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5101.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1863–000.
Applicants: Imperial Valley Solar 1, LLC.
Description: § 205(d) Rate Filing: COC IVS1 Wistaria CSOLAR IV South to be effective 5/16/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5102.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1864–000.
Applicants: Public Service Company of Colorado.
Description: Compliance filing: 2019–05–15 Order 845 Compliance Filing to be effective 5/22/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5121.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1865–000.
Applicants: Blossburg Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5127.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1866–000.
Applicants: Hamilton Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5130.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1867–000.
Applicants: Hunterstown Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5133.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1868–000.
Applicants: Niles Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5136.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1869–000.
Applicants: Orrtanna Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5139.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1870–000.
Applicants: Shawnee Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5141.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1871–000.
Applicants: Titus Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5144.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1872–000.
Applicants: Tolna Power, LLC.
Description: Baseline eTariff Filing: New Baseline Market-Based Rate Tariff Filing to be effective 7/1/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5146.
Comments Due: 5 p.m. ET 6/5/19.

Docket Numbers: ER19–1873–000.
Applicants: Phoenix Energy New England, LLC.
Description: Tariff Cancellation: Cancellation of MBR Tariff to be effective 5/15/2019.
Filed Date: 5/15/19.
Accession Number: 20190515–5148.
Comments Due: 5 p.m. ET 6/5/19.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 15, 2019.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2019–10533 Filed 5–20–19; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0525; FRL–9994–00–OAR]

Proposed Information Collection Request; Comment Request; Registration of Fuels and Fuel Additives—Health-Effects Research Requirements for Manufacturers; EPA ICR No. 1696.10, OMB Control No. 2060–0297

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an Information Collection Request (ICR), Registration of Fuels and Fuel Additives—Health-Effects Research Requirements for Manufacturers, EPA ICR No. 1696.10, OMB Control No. 2060–0297, to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through November 30, 2019. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before July 22, 2019.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2006–0525, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Compliance Division, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 343–9303; fax number: (202) 343–2800; email address: *caldwell.jim@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: In accordance with the regulations at 40 CFR 79, subparts A, B, C, and D, Registration of Fuels and Fuel Additives, manufacturers (including importers) of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives for those fuels, are required to have these products registered by the EPA prior to their introduction into commerce. Registration involves providing a chemical description of the fuel or additive, and certain technical, marketing, and health-effects information. The development of health-effects data, as required by 40 CFR 79, subpart F, is the subject of this ICR. The information collection requirements for Subparts A through D, and the supplemental notification requirements of Subpart F (indicating how the manufacturer will satisfy the health-effects data requirements) are covered by a separate ICR (EPA ICR Number 309.15, OMB Control Number 2060–0150). The health-effects data will be used to determine if there are any products which have evaporative or combustion emissions that may pose an unreasonable risk to public health, thus meriting further investigation and potential regulation. This information is required for specific groups of fuels and additives as defined in the regulations. For example, gasoline and gasoline additives which consist of only carbon, hydrogen, oxygen, nitrogen, and/or sulfur, and which involve a gasoline oxygen content of less than 1.5 weight percent, fall into a ''baseline'' group. Oxygenated additives, such as ethanol, when used in gasoline at an oxygen level of at least 1.5 weight percent, define separate ''non-baseline'' groups for each oxygenate. Additives which contain elements other than carbon, hydrogen, oxygen, nitrogen, and sulfur fall into separate ''atypical'' groups. There are similar grouping requirements for diesel fuel and diesel fuel additives.

Manufacturers may perform the research independently or may join with other manufacturers to share in the costs for each applicable group. Several research consortiums (groups of manufacturers) have been formed. The largest consortium, organized by the American Petroleum Institute (API), represents most of the manufacturers of baseline gasoline, baseline diesel fuel, baseline fuel additives, and the prominent non-baseline oxygenated additives for gasoline. The research is structured into three tiers of requirements for each group. Tier 1 requires an emissions characterization and a literature search for information on the health effects of those emissions. Voluminous Tier 1 data for gasoline and diesel fuel were submitted by API and others in 1997. Tier 1 data have been submitted for biodiesel, water/diesel emulsions, several atypical additives, and renewable gasoline and diesel fuels. Tier 2 requires short-term inhalation exposures of laboratory animals to emissions to screen for adverse health effects. Tier 2 data have been submitted for baseline diesel, biodiesel, and water/diesel emulsions. Alternative Tier 2 testing can be required in lieu of standard Tier 2 testing if EPA concludes that such testing would be more appropriate. EPA reached that conclusion with respect to gasoline and gasoline-oxygenate blends, and alternative requirements were established for the API consortium for baseline gasoline and six gasoline-oxygenate blends. Alternative Tier 2 requirements have also been established for the manganese additive MMT manufactured by the Afton Chemical Corporation (formerly the Ethyl Corporation). Tier 3 provides for follow-up research, at EPA's discretion, when remaining uncertainties as to the significance of observed health effects, welfare effects, and/or emissions exposures from a fuel or fuel/additive mixture interfere with EPA's ability to make reasonable estimates of the potential risks posed by emissions from a fuel or additive. To date, EPA has not imposed any Tier 3 requirements. Under

regulations promulgated pursuant to Section 211 of the Clean Air Act, (1) submission of the health-effects information is necessary for a manufacturer to obtain registration of a motor-vehicle gasoline, diesel fuel, or fuel additive, and thus be allowed to introduce that product into commerce, and (2) the information shall not be considered confidential.

Form Numbers: None.

Respondents/affected entities: Manufacturers of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives for those fuels.

Respondent's obligation to respond: Mandatory per 40 CFR 79.

Estimated number of respondents: 2.

Frequency of response: On occasion.

Total estimated burden: 17,600 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $2.2 million per year, includes $0.6 million annualized capital or operation & maintenance costs.

Changes in Estimates: There is a $0.2 million increase in cost. This increase is due to a revision in the work force labor rates.

Dated: May 13, 2019.

Byron J. Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2019–10564 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2019–0039; FRL–9992–38]

Pesticide Product Registration; Receipt of Applications for New Active Ingredients

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before June 20, 2019.

ADDRESSES: Submit your comments, identified by the Docket Identification (ID) Number and the File Symbol of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov;* or Robert McNally, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov.* The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Registration Applications

EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

III. New Active Ingredients

1. *File Symbol:* 279–GAGI. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F9990. *Active ingredient:* Fungicide—fluindapyr at 98%. *Proposed use:* Cereal grains except rice (Crop Group 15); small vine climbing fruit except fuzzy kiwifruit (Subgroup 13–07F); soybean; tree nuts (Crop Group 14–12); turf and ornamental sites in residential, commercial, and institutional lawns and landscapes; golf courses; sod farms; utility right-of-ways; roadsides; railways; industrial areas; and container and field grown ornamentals. *Contact:* RD.

2. *File Symbol:* 279–GAGO. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F9944–74 T&O SC Fungicide. *Active ingredient:* Fungicide—fluindapyr at 42.4%. *Proposed use:* Turf in home lawns, golf courses, in lawns and landscape areas around public, industrial, and commercial properties; athletic fields; commercial sod farms; ornamental plants in lawns and landscape areas around public, industrial, commercial and residential properties; container

and field grown ornamentals; nurseries; ornamentals in greenhouses; interiorscapes; and other enclosed structures. *Contact:* RD.

3. *File Symbol:* 279–GAGT. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F9944–74. *Active ingredient:* Fungicide—fluindapyr at 42.4%. *Proposed use:* Cereal grains except rice (Crop Group 15), corn (field corn, field corn grown for seed, popcorn, and sweet corn), grain sorghum, wheat, triticale, and barley; small vine climbing fruit except fuzzy kiwifruit (Subgroup 13–07F), grape; soybean; and tree nuts (Crop Group 14–12). *Contact:* RD.

4. *File Symbol:* 279–GAUE. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F4412–1. *Active ingredient:* Fungicide—azoxystrobin at 15.7%, fluindapyr at 10.5%, and flutriafol at 15.7%. *Proposed use:* Corn (field corn, field corn grown for seed, popcorn, and sweet corn), soybean, grain sorghum, wheat, triticale, and barley. *Contact:* RD.

5. *File Symbol:* 279–GAUG. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F4413–1. *Active ingredient:* Fungicide—fluindapyr at 15.7% and flutriafol at 26.2%. *Proposed use:* Corn (field corn, field corn grown for seed, popcorn, and sweet corn), soybean, grain sorghum, wheat, triticale, and barley. *Contact:* RD.

6. *File Symbol:* 279–GAUN. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F4406–1. *Active ingredient:* Fungicide—fluindapyr at 20.9% and flutriafol at 20.9%. *Proposed use:* Grapes (fresh, juice, table, wine, and raisin), almond, walnut, pecan, and hazelnut. *Contact:* RD.

7. *File Symbol:* 279–GAUR. *Docket ID number:* EPA–HQ–OPP–2018–0551. *Applicant:* FMC Corporation, 2929 Market Street, Philadelphia, PA 19104. *Product name:* F4406–1 T&O SC Fungicide. *Active ingredient:* Fungicide—fluindapyr at 20.9% and flutriafol at 20.9%. *Proposed use:* Turf in home lawns, golf courses, in lawns and landscape areas around public, industrial, and commercial properties; athletic fields; commercial sod farms; ornamental plants in lawns and landscape areas around public, industrial, commercial and residential properties; container and field grown ornamentals; nurseries; ornamentals in greenhouses; interiorscapes; and other enclosed structures. *Contact:* RD.

8. *File Symbol:* 7969–UGU. *Docket ID number:* EPA–HQ–OPP–2019–0142. *Applicant:* BASF Corporation, 26 Davis Dr., Research Triangle Park, NC 27709. *Product name:* GMB151 Soybean. *Active ingredient:* Plant-incorporated protectant—*Bacillus thuringiensis* Cry14Ab-1 protein and the genetic material necessary for its production (vector pSZ8832) in GMB151 soybean at <0.016622%. *Proposed use:* Nematicide. *Contact:* BPPD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 23, 2019.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2019–10502 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9993–80–OA]

Announcement of the Board of Directors for the National Environmental Education Foundation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of appointment.

SUMMARY: The National Environmental Education and Training Foundation (doing business as The National Environmental Education Foundation) or (NEEF) was created by Section 10 of Public Law 101–619, the National Environmental Education Act of 1990 (NEEA) as a private non-profit organization. It was established by Congress as a common ground upon which leaders from business and industry, all levels of government, public interest groups, and others can work cooperatively to raise a greater national awareness of environmental issues beyond traditional classrooms. Per NEEA, the EPA Administrator is the sole entity statutorily responsible for appointing NEEF's Board of Directors. The Administrator announces the following four-year appointments to NEEF's Board of Directors, effective August 19, 2019:

- Todd Greenwood—National FFA Organization
- Katherine Emerson—National Corn Growers Association (NCGA), Congressional Hunger Center
- Don Mattingly—Major League Baseball & the Miami Marlins
- Katie Hogge—Ocean Conservancy & American Conservation Coalition

Additional considerations: As an independent foundation, NEEF is different from the Agency's several federal advisory committees and scientific boards, which have their own appointment processes. Because NEEA gives complete discretion to the Administrator in appointing members to NEEF's Board of Directors, EPA is taking additional steps to ensure all prospective members are qualified to serve on the Board and represent diverse points of view. In early 2019, EPA's Office of the Administrator formed an internal review panel comprised of senior EPA career officials tasked with verifying the qualifications of all future members of the NEEF Board of Directors selected by the Administrator. All new Board appointees underwent review by the panel prior to publication of this notice. These appointees will join the current Board members. Information on Board members is available on NEEF's public website: *https://www.neefusa.org/about-neef/board.*

FOR FURTHER INFORMATION CONTACT: For information regarding this Notice of Appointment, please contact Lee Tanner, 202–564–4988, Acting Supervisor for the Office of Environmental Education, U.S. EPA, 1200 Pennsylvania Avenue NW, Washington, DC 20460. General information concerning NEEF may be found here: *https://www.neefusa.org/.*

SUPPLEMENTARY INFORMATION: Section 10(a) of the National Environmental Education Act of 1990 (NEEA) establishes the National Environmental Education Foundation and its underlying terms. The statute in its entirety is available on EPA's website and may be accessed here: *https://www.epa.gov/education/national-environmental-education-act#s10.*

Section 10 of the NEEA provides the following, in pertinent part:

(a) Establishment and Purposes—

(1) ESTABLISHMENT—(A) There is hereby established the National Environmental Education Foundation. The Foundation is established in order to extend the contribution of environmental education and training to meeting critical environmental protection needs, both in this country and internationally; to facilitate the cooperation, coordination, and contribution of public and private resources to create an environmentally advanced educational system; and to foster an open and effective partnership among Federal, State, and local government, business, industry, academic institutions, community based

environmental groups, and international organizations.

(B) The Foundation is a charitable and nonprofit corporation whose income is exempt from tax, and donations to which are tax deductible to the same extent as those organizations listed pursuant to section 501(c) of the Internal Revenue Code of 1986. The Foundation is not an agency or establishment of the United States.

(2) PURPOSES—The purposes of the Foundation are—

(A) subject to the limitation contained in the final sentence of subsection (d) herein, to encourage, accept, leverage, and administer private gifts for the benefit of, or in connection with, the environmental education and training activities and services of the United States Environmental Protection Agency;

(B) to conduct such other environmental education activities as will further the development of an environmentally conscious and responsible public, a well-trained and environmentally literate workforce, and an environmentally advanced educational system; and

(C) to participate with foreign entities and individuals in the conduct and coordination of activities that will further opportunities for environmental education and training to address environmental issues and problems involving the United States and Canada or Mexico.

(3) PROGRAMS—The Foundation will develop, support, and/or operate programs and projects to educate and train educational and environmental professionals, and to assist them in the development of environmental education and training programs and studies.

(b) Board of Directors

(1) ESTABLISHMENT AND MEMBERSHIP—(A) The Foundation shall have a governing Board of Directors (hereafter referred to in this section as 'the Board'), which shall consist of 13 directors, each of whom shall be knowledgeable or experienced in the environment, education and/or training. The Board shall oversee the activities of the Foundation and shall assure that the activities of the Foundation are consistent with the environmental and education goals and policies of the EPA and with the intents and purposes of this Act. The membership of the Board, to the extent practicable, shall represent diverse points of view relating to environmental education and training.

(2) APPOINTMENT AND TERMS—(A) Members of the Board shall be appointed by the EPA Administrator.

(B) Within 90 days of the date of the enactment of this Act, and as appropriate thereafter, the Administrator shall publish in the **Federal Register** an announcement of appointments of Directors of the Board. Such appointments become final and effective 90 days after publication of the Notice of Appointment in the **Federal Register**.

(C) The directors shall be appointed for terms of 4 years. The Administrator shall appoint an individual to serve as a director in the event of a vacancy on the Board within 60 days of said vacancy in the manner in which the original appointment was made. No individual may serve more than 2 consecutive terms as a director.

In December 2018, NEEF signed a first-time Memorandum of Understanding with the (EPA) Acting Administrator Andrew R. Wheeler to establish increased coordination between EPA and the NEEF on key EPA initiatives including, but not limited to, EPA's Trash Free Waters Program, Winning on Reducing Food Waste initiative, and Healthy Schools initiative.

Dated: May 9, 2019.

Elizabeth (Tate) Bennett,

Associate Administrator, Office of Public Engagement and Environmental Education.

[FR Doc. 2019–10569 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2018–0758, FRL–9993–86–OMS]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Part B Permit Application, Permit Modifications, and Special Permits (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Part B Permit Application, Permit Modifications, and Special Permits (EPA ICR Number 1573.15, OMB Control Number 2050–0009) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through May 31, 2019. Public comments were previously requested via the **Federal Register** on December 10, 2018 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before July 22, 2019.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2018–0758, to (1) EPA, either online using *www.regulations.gov* (our preferred method), or by email to *rcra-docket@epa.gov,* or by mail to: RCRA Docket (2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.* Address comments to OMB Desk Officer for EPA.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Section 3005 of Subtitle C of RCRA requires treatment, storage or disposal facilities (TSDFs) to obtain a permit. To obtain the permit, the TSDFs must submit an application describing the facility's operation. There are two parts to the RCRA permit application—Part A and Part B. Part A defines the processes to be used for treatment, storage, and disposal of hazardous wastes; the design capacity of such processes; and the specific hazardous wastes to be handled at the facility. Part

B requires detailed site-specific information such as geologic, hydrologic, and engineering data. In the event that permit modifications are proposed by the applicant or the EPA, modifications must conform to the requirements under Sections 3004 and 3005. This ICR provides a comprehensive discussion of the requirements for owner/operators of TSDFs submitting applications for a Part B permit or permit modification.

Form Numbers: None.

Respondents/affected entities: Private sector and State, Local, or Tribal governments.

Respondent's obligation to respond: Mandatory (RCRA Section 3005).

Estimated number of respondents: 159.

Frequency of response: On occasion.

Total estimated burden: 20,086 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $7,008,865 (per year), which includes $5,697,625 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is decrease of 4,840 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to the smaller number of affected facilities, based on the current information and reporting requirements from the RCRAInfo database.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2019–10487 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2018–0651; FRL–9993–39]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 of Unit II, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

This cancellation order follows an October 17, 2018 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 2 of Unit II, to voluntarily cancel these product registrations. In the October 17, 2018 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 180-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective May 21, 2019.

FOR FURTHER INFORMATION CONTACT: Christopher Green, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0367; email address: *green.christopher@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2018–0651, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

This notice announces the cancellation, as requested by registrants, of products registered under FIFRA section 3 (7 U.S.C. 136a). These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

Registration No.	Company No.	Product name	Active ingredients
5481–602	5481	Squadron Herbicide	Pendimethalin & 3-Quinolinecarboxylic acid, 2-(4,5-dihydro-4-methyl-4-(1-methylethyl)-5-oxo-1H-imidazol-2-yl)-, monoammonium salt.
5481–605	5481	Steel Herbicide	Imazethapyr; Pendimethalin & Imazaquin.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS OF CANCELLED PRODUCTS

EPA company No.	Company name and address
5481	AMVAC Chemical Corporation, 4695 MacArthur Court, Suite 1200, Newport Beach, CA 92660–1706.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the October 17, 2018 **Federal Register** notice announcing the Agency's receipt of the requests for voluntary cancellation of the products listed in Table 1 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II, are canceled. The effective date of the cancellations that are the subject of this notice is May 21, 2019. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II, in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI, will be a violation of FIFRA.

V. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of October 17, 2018 (83 FR 52448) (FRL–9983–90). The comment period closed on April 15, 2019.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II, until May 21, 2020, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1, except for export in accordance with FIFRA section 17 (7 U.S.C. 136o), or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II, until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: May 7, 2019.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2019–10561 Filed 5–20–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 84 FR 21777.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, May 21, 2019 at 10:00 a.m. and its continuation at the conclusion of the open meeting on May 23, 2019.

CHANGES IN THE MEETING: This meeting will also discuss: Matters relating to internal personnel decisions, or internal rules and practices.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Laura E. Sinram,

Deputy Secretary of the Commission.

[FR Doc. 2019–10648 Filed 5–17–19; 11:15 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 17, 2019.

A. *Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. BBIG Holdings, LLC, Lincoln, Nebraska; to retain its investment in, OriTrust, LLC, Lincoln, Nebraska, and thereby engage in extending credit and data processing activities, pursuant to section 225.28(b)(b)(1) and (14) of Regulation Y.

2. *Hilltop Bancshares, Inc., Bennington, Nebraska;* to retain its investment in, OriTrust, LLC, Lincoln, Nebraska, and thereby engage in extending credit and data processing activities, pursuant to section 225.28(b)(b)(1) and (14) of Regulation Y.

Board of Governors of the Federal Reserve System, May 16, 2019.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2019–10559 Filed 5–20–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–4188–FN]

Medicare Program; Approved Renewal of Deeming Authority of the Utilization Review Accreditation Commission for Medicare Advantage Health Maintenance Organizations and Local Preferred Provider Organizations

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final notice.

SUMMARY: This notice announces our decision to renew the Medicare Advantage ''deeming authority'' of the Utilization Review Accreditation Commission (URAC) for health maintenance organizations and preferred provider organizations for a term of 6 years.

DATES: The renewal announced in this notice is effective on May 31, 2019 through June 2, 2025.

FOR FURTHER INFORMATION CONTACT: Greg McDonald, (410) 786–8941; or Nick Proy, (410) 786–8407.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services through a Medicare Advantage (MA) organization that contracts with CMS. The regulations specifying the Medicare requirements that must be met for a Medicare Advantage Organization (MAO) to enter into a contract with CMS are located at 42 CFR part 422.These regulations implement Part C of Title XVIII of the Social Security Act (the Act), which specifies the services that an MAO must provide and the requirements that the organization must meet to be an MA contractor. Other relevant sections of the Act are Parts A and B of Title XVIII and Part A of Title XI pertaining to the provision of services by Medicare certified providers and suppliers. Generally, for an entity to be an MA organization, the organization must be licensed by the state as a risk bearing organization, as set forth in 42 CFR part 422.

As a method of assuring compliance with certain Medicare requirements, an MA organization may choose to become accredited by a CMS-approved accrediting organization (AO). By virtue of its accreditation by a CMS-approved AO, the MA organization may be ''deemed'' compliant in one or more requirements set forth in section 1852(e)(4)(B) of the Act. For CMS to recognize an AO's accreditation program as establishing an MA plan's compliance with our requirements, the AO must prove to CMS that its standards are at least as stringent as Medicare requirements for MA organizations. MA organizations that are licensed as health maintenance organizations (HMOs) or preferred provider organizations (PPOs) and are accredited by an approved accrediting organization may receive, at their request, deemed status for CMS requirements with respect to the deemable areas. At this time, recognition of accreditation does not include the Part D areas of review set out at 42 CFR 423.165(b). AOs that apply for MA deeming authority are generally recognized by the health care industry as entities that accredit HMOs and PPOs. As we specify at § 422.157(b)(2)(ii), the term for which an AO may be approved by CMS may not exceed 6 years. For continuing approval, the AO must apply to CMS to renew their deeming authority for a subsequent approval period.

The Utilization Review Accreditation Commission (URAC) was approved as a CMS-approved accreditation organization for MA deeming of HMOs and PPOs on May 26, 2012, and that term lapsed on May 25, 2018, prior to our decision on its renewal application. On October 13, 2017, URAC submitted an application to renew its deeming authority. On that same date, URAC submitted materials requested by CMS that included information intended to address the requirements set out at § 422.158(a) through (b) that are prerequisites for receiving approval of its accreditation program from CMS. CMS subsequently requested that additional materials, including revisions, be submitted by URAC to satisfy these requirements. URAC submitted all the necessary materials to enable us to make a determination concerning its request for approval as an accreditation organization, and the renewal application was determined to be complete on November 8, 2018.

II. Provisions of the Proposed Notice

In the December 26, 2018 **Federal Register** (83 FR 66271), we published a proposed notice announcing URAC's request to renew its Medicare Advantage deeming authority for HMOs and PPOs. In the December 26, 2018 proposed notice, we detailed our evaluation criteria. Under section 1852(e)(4) of the Act and § 422.158 (Federal review of accrediting organizations), we conducted a review of URAC's application in accordance with the criteria specified by our regulations which include, but are not limited to the following:

- The types of MA plans that it would review as part of its accreditation process.
- A detailed comparison of the AO's accreditation requirements and standards with the Medicare requirements (for example, a crosswalk) in the following 5 areas: Quality Improvement, Anti-Discrimination, Confidentiality and Accuracy of Enrollee Records, Information on Advance Directives, and Provider Participation Rules.
- Detailed information about the organization's survey process, including—

++ Frequency of surveys and whether surveys are announced or unannounced.

++ Copies of survey forms, and guidelines and instructions to surveyors.

++ Descriptions of—

—The survey review process and the accreditation status decision making process;

—The procedures used to notify accredited MA organizations of deficiencies and to monitor the correction of those deficiencies; and

—The procedures used to enforce compliance with accreditation requirements.

- Detailed information about the individuals who perform surveys for the accreditation organization, including—

++ The size and composition of accreditation survey teams for each type of plan reviewed as part of the accreditation process;

++ The education and experience requirements surveyors must meet;

++ The content and frequency of the in-service training provided to survey personnel;

++ The evaluation systems used to monitor the performance of individual surveyors and survey teams; and

++ The organization's policies and practice with respect to the participation, in surveys or in the accreditation decision process, by an individual who is professionally or financially affiliated with the entity being surveyed.

- A description of the organization's data management and analysis system with respect to its surveys and accreditation decisions, including the kinds of reports, tables, and other displays generated by that system.
- A description of the organization's procedures for responding to and investigating complaints against accredited organizations, including policies and procedures regarding coordination of these activities with

appropriate licensing bodies and ombudsmen programs.

- A description of the organization's policies and procedures with respect to the withholding or removal of accreditation for failure to meet the accreditation organization's standards or requirements, and other actions the organization takes in response to noncompliance with its standards and requirements.
- A description of all types (for example, full, partial) and categories (for example, provisional, conditional, temporary) of accreditation offered by the organization, the duration of each type and category of accreditation and a statement identifying the types and categories that would serve as a basis for accreditation if CMS approves the accreditation organization.
- A list of all currently accredited MA organizations and the type, category, and expiration date of the accreditation held by each of them.
- A list of all full and partial accreditation surveys scheduled to be performed by the accreditation organization.
- The name and address of each person with an ownership or control interest in the accreditation organization.
- CMS also considers URAC's past performance in the deeming program and results of recent deeming validation reviews, or look-behind audits conducted as part of continuing federal oversight of the deeming program under § 422.157(d).

In accordance with section 1865(a)(3)(A) of the Act, the December 26, 2018 proposed notice (83 FR 66271) also solicited public comments regarding whether URAC's requirements met or exceeded the Medicare conditions of participation as an accrediting organization for MA HMOs and PPOs. We received no public comments in response to the December 26, 2018 proposed notice (83 FR 66271).

III. Provisions of the Final Notice

A. Differences Between URAC's Standards and Requirements for Accreditation and Medicare's Conditions and Survey Requirements

We compared the standards and survey process contained in URAC's application with the Medicare conditions for accreditation. Our review and evaluation of URAC's application for continued CMS approval were conducted as described in section II. of this final notice, and yielded the following:

- URAC amended its crosswalk to ensure current URAC standards are clearly cross-walked to our regulations, including the following regulatory requirements for Quality Improvement; Antidiscrimination, Confidentiality and Accuracy of Enrollee Records, Information on Advanced Directives, and Provider Participation Rules: §§ 422.101(f); 422.205(b); 422.110(a) through (b); 422.118(a); 422.128(b); 422.152(a) and (b), (e) through (g); 422.202(a) through (d); 422.206(a) through (b); 422.208(c), (e) through (g); 422.210(b); 422.212(a) through (d); and 422.216(f) through (h).
- URAC submitted additional information and/or documentation regarding its survey process that was intended to address: § 422.158(a)(2), (a)(3)(ii), (a)(3)(iii)(A) through (C), (a)(4)(ii) and (iii), (a)(6) through (10), and (b)(2).

B. Term of Approval

Based on the review and observations described in section II. of this final notice, we have determined that URAC's accreditation program requirements meet or exceed our requirements. Therefore, we approve URAC as a national accreditation organization with deeming authority for MA HMOs and PPOs, effective May 21, 2019.

V. Collection of Information Requirements

This notice announces the new term of approval for the URAC. It does not impose any information collection requirements (that is, reporting, recordkeeping or third-party disclosure requirements). Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

VI. Regulatory Impact Statement

In accordance with the provisions of Executive Order 12866, this regulation was not reviewed by the Office of Management and Budget.

Dated: May 2, 2019.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019–10586 Filed 5–20–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0801]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Exports: Notification and Recordkeeping Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by June 20, 2019.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0482. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Exports: Notification and Recordkeeping Requirements—21 CFR 1.101

OMB Control Number 0910–0482—Extension

Section 801 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 381) charges the Secretary of Health and Human Services, through FDA, with the responsibility of helping to ensure that exports of unapproved new drugs, biologics, devices, animal drugs, food, cosmetics, and tobacco products which are not to be sold in the United States

meet the requirements of the country to which the product is to be exported. The respondents to this information collection are exporters who have notified FDA of their intent to export unapproved products that may not be sold or offered for sale in domestic commerce in the United States as allowed under section 801(e) of the FD&C Act. In general, the notification identifies the product being exported (*e.g.,* name, description, and in some cases, country of destination) and specifies where the notifications were sent. These notifications are sent only for an initial export. Subsequent exports of the same product to the same destination or to certain countries identified in section 802(b) of the FD&C Act (21 U.S.C. 382(b)) would not result in a notification to FDA.

The recordkeepers for this information collection are exporters of products that may not be sold in the United States who are regulated by the following FDA Centers: Center for Drug Evaluation and Research (CDER); Center for Biologics Evaluation and Research (CBER); Center for Devices and Radiological Health (CDRH); Center for Veterinary Medicine (CVM); Center for Food Safety and Applied Nutrition (CFSAN); and Center for Tobacco Products (CTP). Respondents to this collection of information maintain records demonstrating their compliance with the requirements in 21 CFR 1.101.

In the **Federal Register** of February 15, 2019 (84 FR 4473), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
1.101(d) (CBER)	5	92	460	15	6,900
1.101(d) (CDER)	5	180	900	15	13,500
1.101(d) (CDRH)	160	1	160	15	2,400
Total					22,800

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
1.101 (b), (c), (e) (CBER, CDER, CDRH, CFSAN, and CVM)	320	3	960	22	21,120
1.101(b) Office of International Programs only	1	189	189	22	4,158
1.101(b) (currently regulated Tobacco Products)	322	3	966	22	21,252
Total					46,530

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We have adjusted our burden estimate, which has resulted in an overall decrease of 129,543 hours to the currently approved burden. The reporting burden estimate for CDRH has been adjusted to correct an error and corresponding miscalculation in the previous burden estimate and has been updated based on recent internal data. This adjustment contributed to the overall burden estimate reduction by eliminating 8,030 responses and 120,450 hours from the reporting burden estimate. CBER's estimated reporting burden for the information collection in table 1 reflects a decrease of 7,575 hours and a corresponding decrease of total annual responses (193 to 92). We attribute this adjustment to a normal variation in the number of submissions we received over the last few years. CTP's current number of respondents and recordkeeping burden hours in table 2 are expected to decrease by 23 respondents and 1,518 hours. This is based on summary derived from the monthly operational reports that manufacturers and importers of tobacco products are required to file with the Alcohol and Tobacco Tax and Trade Bureau.

Dated: May 16, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–10537 Filed 5–20–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: National Vaccine Program Office, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that a meeting is scheduled to be held of the National Vaccine Advisory Committee (NVAC). The meeting will be open to the public via teleconference; a public comment session will be held during the meeting.

DATES: The meeting will be held on Tuesday and Wednesday, June 4–5, 2019. The confirmed meeting times and agenda will be posted on the NVAC website at *http://www.hhs.gov/nvpo/nvac/meetings/index.html* as soon as they become available.

ADDRESSES: Instructions regarding attending this meeting will be posted one week prior to the meeting at: *http://www.hhs.gov/nvpo/nvac/meetings/index.html.* Pre-registration is required for members of the public who wish to attend the meeting and who wish to participate in the public comment session. Individuals who wish to attend

the meeting and/or participate in the public comment session should register at *http://www.hhs.gov/nvpo/nvac/meetings/index.html.*

FOR FURTHER INFORMATION CONTACT: Ann Aikin, Acting Designated Federal Officer, at the National Vaccine Program Office, U.S. Department of Health and Human Services, Room L129, Mary E. Switzer Building, 330 C. Street SW, Washington, DC 20024. Phone: (202) 690–5566; email: *nvac@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. 300aa–1), the Secretary of HHS was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The NVAC was established to provide advice and make recommendations to the Director of the National Vaccine Program on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

During the June 2019 NVAC meeting, sessions will consist of presentations vaccine communications, adult immunization, and updates from two newly formed working groups. Please note that agenda items are subject to change as priorities dictate. Information on the final meeting agenda will be posted prior to the meeting on the NVAC website: *http://www.hhs.gov/nvpo/nvac/index.html.*

Members of the public will have the opportunity to provide comments at the NVAC meeting during the public comment periods designated on the agenda. Public comments made during the meeting will be limited to two minutes per person to ensure time is allotted for all those wishing to speak. Individuals are also welcome to submit written comments. Written comments should not exceed two pages in length. Individuals submitting written comments should email their comments to the National Vaccine Program Office (*nvac@hhs.gov*) at least five business days prior to the meeting.

Dated: May 10, 2019.

Ann Aikin,

Acting Designated Federal Official.

[FR Doc. 2019–10574 Filed 5–20–19; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Modified Systems of Records Notice for State-Provided Physician Records (Renamed Health Professional Service Delivery Data), 09–15–0066; Privacy Act of 1974; System of Records

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of a Modified System of Records.

SUMMARY: In accordance with requirements of the Privacy Act of 1974, as amended, the Department of Health and Human Services (HHS) is updating an existing system of records maintained by the Health Resources and Services Administration (HRSA), System No. 09–15–0066 ''State-Provided Physician Records for the Application Submission & Processing System.'' The system of records covers service delivery data pertaining to individual health care providers practicing in eligible primary care, mental health, and dental disciplines, which is used by state partners to apply for, and by HRSA to designate, health professional shortage areas and medically underserved areas and populations. The modifications include adding a unique identifier for providers, known as the National Provider Identifier; and changing the system name to ''Health Professional Service Delivery Data Used to Designate Health Professional Shortage Areas (HPSAs) and Medically Underserved Areas and Populations (MUA/Ps).''

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is applicable May 21, 2019, subject to a 30-day period in which to comment on the new and revised routine uses, described below. Please submit any comments by June 20, 2019.

ADDRESSES: Written comments may be submitted by email to *sdb@hrsa.gov* or by mail, addressed to: ATTN: HRSA/BHW/DPSD, 5600 Fishers Ln., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: General questions about the revised system of records may be submitted by email to *sdb@hrsa.gov,* or telephone to 301–594–5968, or by mail addressed to Dr. Janelle McCutchen, Division of Policy and Shortage Designation, Bureau of Health Workforce (BHW), Health Resources and Services Administration (HRSA), 5600 Fishers Ln., Rockville, MD 20857.

SUPPLEMENTARY INFORMATION: This system of records was established in 2005 (see 70 FR 1724) and was last comprehensively updated in 2010 (see 75 FR 19652). The primary reason for updating the system of records again is to add a unique identifier for providers, known as the National Provider Identifier, which HRSA will obtain from CMS' National Plan and Provider Enumeration System (NPPES), System No. 09–70–0555 (formerly 09–70–0008; the number was changed to 09–70–0555 in 2010). On behalf of the Secretary of HHS, NPPES collects and maintains information needed to uniquely identify an individual physician or non-physician practitioner, assign a National Provider Identifier (NPI) to that physician or non-physician practitioner, and maintain and update the information in that health care provider's record in NPPES.

In addition to reformatting the System of Records Notice to comply with OMB Circular A–108 and updating office names in the System Location and System Manager sections, modifications made to the system of records include the following substantive changes:

1. The system name has been changed to ''Health Professional Service Delivery Data Used to Designate Health Professional Shortage Areas (HPSAs) and Medically Underserved Areas and Populations (MUA/Ps)'' to more clearly indicate the nature of the records.

2. Section 330 of the Public Health Service Act (PHSA) (42 U.S.C. 254b) and the U.S. Code citation for Section 332 of the PHSA (42 U.S.C. 254e) have been added to the Authorities section.

3. The Purposes section has been expanded to include additional purposes for which records may be used, such as: (1) Creation of aggregate datasets to use in conducting workforce analyses; and (2) granting Organizational Points of Contact access to the system to validate provider data.

4. The Categories of Individuals section has been updated to specify that the collection of health professional service delivery data is limited to providers who are assigned a National Provider Identifier by the NPPES.

5. The Categories of Records section now states a record category and includes an updated list of data elements.

6. The Record Source Categories section now includes the new data source, NPPES.

7. The Routine Uses section, which formerly contained four routine uses, now contains 11 routine uses, of which two are revised and seven are new. Specifically:

- Routine use 1 (authorizing disclosures to HRSA's state partners) was revised to be consistent with each

state partner's ownership rights in the data it provides. The limitation on each state partner's ability to use and share data provided by another state partner is also defined.

• Former routine uses 2 and 3 (which authorized disclosures to HHS contractors for particular purposes) are now combined as revised routine use 2. This routine use was broadened to cover any purpose of the system of records for which a contractor may be engaged to assist HHS and require access to the records.

• Routine uses 3 through 7 and 10 are new; they authorize disclosures which are not for direct program purposes, but are for related purposes which might arise in any system of records; *i.e.,* to congressional offices for the purpose of responding to constituent requests; to the U.S. Department of Justice for litigation purposes; to law enforcement agencies for law enforcement purposes, when a record indicates a violation or potential violation of law; to volunteers and others who function akin to agency employees, but lack employee status; to the National Archives and Records Administration during records management inspections; and to the Department of Homeland Security for cybersecurity monitoring purposes.

• Routine use 11 is also new; it defines a new group—Organizational Points of Contact (OPOCs) of automatically designated health facilities—to which records may be disclosed, for the purpose of validating clinician services hours to corroborate health professional shortage.

8. The Retrieval section previously stated that records were retrieved by personal identifier, and now specifies the personal identifiers used for retrieval.

9. The Retention and Disposal section previously indicated a record disposition schedule was in the process of being developed, and now identifies the applicable schedule. Because some of these changes are significant, a report on the modified system of records was sent to OMB and Congress in accordance with 5 U.S.C. 552a(r).

System Name and Number

Health Professional Service Delivery Data Used to Designate Health Professional Shortage Areas (HPSAs) and Medically Underserved Areas and Populations (MUA/Ps), System Number 09–15–0066.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The address of the agency component responsible for the system of records is: Division of Policy and Shortage Designation, Bureau of Health Workforce (BHW), Health Resources and Services Administration (HRSA), 5600 Fishers Ln., Rockville MD 20857.

SYSTEM MANAGER(S):

The System Manager for the system of records is the following Policy-Coordinating Official: Dr. Janelle McCutchen, Division of Policy and Shortage Designation, Bureau of Health Workforce (BHW), Health Resources and Services Administration (HRSA), 5600 Fishers Ln., Rockville MD 20857, *sdb@hrsa.gov,* (301) 594–5168.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 332 of the Public Health Service Act (PHSA) (42 U.S.C. 254e) provides that the Secretary of Health and Human Services shall designate Health Professional Shortage Areas (HPSAs), based on criteria established by regulation. Section 330 of the PHSA (42 U.S.C. 254b) authorizes the Secretary to designate Medically Underserved Areas (MUAs) and Medically Underserved Populations (MUPs). The authority for shortage designation is delegated to the Bureau of Health Workforce Division of Policy and Shortage Designation, Shortage Designation Branch (SDB). The approval process and designation criteria used for shortage designations were developed in accordance with requirements of secs. 330 and 332 of the PHSA. To accomplish this task, the SDB relies on data specified in 42 CFR part 5, which implements sec. 332 of the PHSA and outlines HPSA criteria, to for the review of applications submitted by State Primary Care Offices (PCO) and their affiliates for designation status.

PURPOSE(S) OF THE SYSTEM:

Health professional service delivery data for individual providers is used by HRSA, its state partners, and Organizational Points of Contact for the following purposes:

• State partners use the data to assess and determine if an area or specific population group is experiencing a shortage in health professionals, in order to apply for such areas or groups to be designated as Health Professional Shortage Areas (HPSAs), Medically Underserved Areas (MUAs), or Medically Underserved Populations (MUPs).

• Organizational Points of Contact use the data to validate clinician service hours in order to corroborate health professional shortage.

• HRSA uses the data to designate HPSAs, MUAs, and MUPs.

• HRSA also uses the data to create aggregate datasets, which are used by HRSA and state partners to conduct workforce analyses.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The data pertains to individual health care providers who are assigned a National Provider Identifier by the Centers for Medicare & Medicaid Services (CMS), National Plan and Provider Enumeration System (NPPES), and are practicing in eligible primary care, mental health, and dental disciplines relevant to HPSA, MUA, or MUP applications and designations.

CATEGORIES OF RECORDS IN THE SYSTEM:

The records consist of health professional service delivery information for subject health care providers as provided by state partners. The data elements include, but are not necessarily limited to:

National Provider Identifier *
License Number *
Date of Birth *
Taxonomy *
Discipline
Specialty
Address (Business Practice Location) *
City (Business Practice Location) *
State (Business Practice Location) *
Postal Code (Business Practice Location) *
Dental Auxiliaries (Dental Providers Only)
Direct Tour Hours
Employed by a Correctional Facility?
Employed by a State/County Mental Hospital?
Annual Medicaid Claims
Patient Percent—Medicaid
Patient Percent—Homeless
Patient Percent—Migrant Farmworker
Patient Percent—Native American
Patient Percent—Sliding Fee Scale
Patient Percent—Migrant Seasonal Farmworker
Resident/Intern
J1 Visa Waiver Holder Status
Federal Provider Status
National Health Service Core Participant

* *Sourced from The Centers for Medicare & Medicaid Services (CMS) National Plan and Provider Enumeration System (NPPES).*

RECORD SOURCE CATEGORIES:

Data about providers is obtained from two sources and combined in HRSA's Shortage Designation Management System (SDMS):

• State Partners: State Primary Care Office (PCO) grantees of state

departments of health and other public or private entities a PCO has entered into a contractual agreement with, such as State Primary Care Associations.

• The Centers for Medicare & Medicaid Services (CMS) National Plan and Provider Enumeration System (NPPES).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

HHS may disclose a record about a health care provider from this system of records to parties outside HHS, without the provider's prior written consent, pursuant to these routine uses:

1. Records may be disclosed to state partners that have been granted access to the information technology system in which HRSA maintains provider records (currently known as the Shortage Designation Management System). Each state partner's access to provider records maintained in the system will be limited to providers practicing in the partner's respective state. State partners are granted access to these records for the sole purpose of entering provider service delivery data for HPSA and MUA/P administrative and designation purposes. State partners include Primary Care Office (PCO) grantees of state departments of health and other public or private entities a PCO has entered into a contractual agreement with, such as State Primary Care Associations. Each state partner retains rights to the data it enters about providers in its state and is explicitly prohibited from extracting data contributed by other states for its own use or dissemination to a third party without obtaining prior permission from the appropriate PCO.

2. Records may be disclosed to HHS grantees, contractors, and subcontractors that have been engaged to assist HHS in the accomplishment of a HHS function relating to the purposes of this system of records and that need to have access to the records in order to assist HHS in performing the activity. All grantees, contractors and subcontractors shall be required to comply with the Privacy Act with respect to such records.

3. Records may be disclosed to a member of Congress or congressional staff member in response to a written inquiry of the congressional office made at the written request of the constituent about whom the record is maintained. The congressional office does not have any greater authority to obtain records than the individual would have if requesting the records directly.

4. Records may be disclosed to the U.S. Department of Justice (DOJ), or to a court or other tribunal, when:

a. HHS or any of its components; or

b. any employee of HHS acting in the employee's official capacity; or

c. any employee of HHS acting in the employee's individual capacity where DOJ has agreed to represent the employee; or

d. the United States Government, is a party to litigation or has an interest in litigation and, by careful review, HHS determines that the records are both relevant and necessary to the litigation.

5. Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate public authority, whether federal, state, local, tribal, territorial, foreign, or otherwise, charged with the responsibility of enforcing, investigating, or prosecuting the violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to the enforcement, regulatory, investigative, or prosecutorial responsibility of the receiving entity.

6. Records may be disclosed to student volunteers, individuals working under a personal services contract, and other individuals performing functions relating to the purposes of this system of records for the Department but technically not having the status of agency employees, if they need access to the records in order to perform their assigned agency functions.

7. Records may be disclosed to representatives of the National Archives and Records Administration during records management inspections conducted pursuant to 44 U.S.C. 2904 and 2906.

8. Records may be disclosed to appropriate agencies, entities, and persons when (1) HHS suspects or has confirmed that there has been a breach of the system of records, (2) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HHS (including its information systems, programs, and operations), the federal government, or national security, and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

9. Records may be disclosed to another federal agency or federal entity, when HHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security, resulting from a suspected or confirmed breach.

10. Records may be disclosed to the U.S. Department of Homeland Security (DHS) if captured in an intrusion detection system used by HHS and DHS pursuant to a DHS cybersecurity program that monitors internet traffic to and from federal government computer networks to prevent a variety of types of cybersecurity incidents.

11. Records may be disclosed to Organizational Points of Contact (OPOCs) of health facilities that are automatically designated as serving a health professional shortage area. OPOCs use the data to validate clinician service hours to corroborate health professional shortage. Automatically designated facility HPSAs include:

• health centers (funded under sec. 330);
• health center look-alikes;
• Tribally-run clinics;
• urban Indian organizations;
• dual-funded Tribal health centers;
• federally-run Indian health service clinics; and,
• rural health clinics as deemed by the Secretary of HHS.

The disclosures authorized by publication of the above routine uses pursuant to 5 U.S.C. 552a(b)(3) are in addition to other disclosures authorized directly in the Privacy Act at 5 U.S.C. 552a(b)(2) and (b)(4)–(11).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are maintained in database servers. Servers for the database are currently located at the Center for Information Technology, National Institutes of Health, Bethesda, MD. Historical paper files for program records, which may include data for providers, are archived at the Washington National Records Center in Suitland, MD.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

System records are retrieved by using a provider's National Provider

Identifier. Other system search filters such as last name or first name can also be used to retrieve provider records.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are destroyed 18 years after the date of the applicable letter of determination, per disposition authority number DAA–0512–2014–0004, item 2.9 (formerly N1–512–92–01, item 2). This retention schedule is media neutral (applies to all media, including paper).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Safeguards conform to HHS Information Security and Privacy Program, *https://www.hhs.gov/ocio/securityprivacy/index.html.* Information is safeguarded in accordance with applicable laws, rules and policies, including the HHS Information Technology Security Program Handbook, all pertinent National Institutes of Standards and Technology (NIST) publications, and OMB Circular A–130, Managing Information as a Strategic Resource.

Administrative Safeguards: Access to paper and electronic records is limited to persons authorized to update, view, or maintain provider records. Authorized users include internal users such as government and contractor personnel and external users such as state partners. Internal users must attend security training and sign a Rules of Behavior, which is renewed annually. All external users must also sign a Rules of Behavior and register to receive approval to access system records. All users are given role-based access to the system on a limited need-to-know basis. Approved users' access to system records is controlled by two factor authentication. Physical and logical access to the system is removed upon termination of employment or other change in the user's role.

Technical Safeguards: Electronic records are protected from unauthorized access by encryption, intrusion detection, and firewalls. Routine system security scans are run to detect web and architecture vulnerabilities.

Physical Safeguards: Servers and other computer equipment used to process identifiable data are located in secured areas and use physical access devices (*e.g.,* keys, locks, combinations, card readers) and/or security guards to control entries into the facility. All facilities housing HRSA information systems maintain fire suppression and detection devices/systems (*e.g.,* sprinkler systems, handheld fire extinguishers, fixed fire hoses, and/or smoke detectors) that are activated in the event of a fire. The same physical safeguards are utilized at the federal records center where older paper records are stored.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves in this system of records must submit a written request to the System Manager/Policy Coordinating Official at the address specified in the ''System Manager'' section above. The requester must verify his or her identity by providing either a notarization of the request or a written certification that the requester is who he or she claims to be and understands that the knowing and willful request for access to a record pertaining to an individual from an agency under false pretenses is a criminal offense under the Privacy Act, subject to a five thousand dollar fine. Requesters may also ask for an accounting of disclosures that have been made of their records, if any.

CONTESTING RECORD PROCEDURES:

An individual seeking to amend a record about him or her in this system of records must submit a written request to the System Manager indicated above, verify his or her identity in the same manner as is required for an access request, and reasonably identify the record and specify the information being contested, the corrective action sought, and the reasons for requesting the correction, along with any supporting documentation. The right to contest records is limited to information that is incomplete, incorrect, untimely, or irrelevant.

NOTIFICATION PROCEDURES:

An individual who wishes to know if this system of records contains records about him or her must submit a written request to the System Manager indicated above, and must verify his or her identity in the same manner as is required for an access request.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

75 FR 19652 (Apr. 15, 2010), 83 FR 6591 (Feb. 14, 2018).

Dated: May 14, 2019.

George Sigounas,

Administrator.

[FR Doc. 2019–10478 Filed 5–20–19; 8:45 am]

BILLING CODE 4160–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Loan Repayment Programs (LRP), (Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the NIH will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Steve Boehlert, Director of Operations, Division of Loan Repayment (DLR), National Institutes of Health, 6700B Rockledge Dr., Room 2300 (MSC 6904), Bethesda, Maryland 20892–6904 or email your request, including your address to: *BoehlerS@od.nih.gov* or call (301) 451–4465. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Loan Repayment Programs (LRPs), 0925–0361, expiration date 08/31/19, EXTENSION, Office of the Director (OD), National Institutes of Health (NIH).

Need and Use of Information Collection: The NIH makes available financial assistance, in the form of educational loan repayment, to M.D., Ph.D., Pharm.D., Psy.D., D.O., D.D.S., D.M.D., D.P.M., DC, N.D., O.D., D.V.M, or equivalent doctoral degree holders who perform biomedical or behavioral research in NIH intramural laboratories or as extramural grantees or scientists funded by domestic non-profit organizations for a minimum of two years (three years for the General Research subcategory) in research areas supporting the mission and priorities of the NIH. The information proposed for collection will be used by the DLR to determine an applicant's eligibility for the program.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 27,481.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hours
Initial Extramural Applicants	1,650	1	8	13,200
Renewal Extramural Applicants	1,000	1	8	8,000
Initial Intramural Applicants	40	1	8	320
Renewal Intramural Applicants	40	1	8	320
Recommenders	10,760	1	30/60	5,380
Institutional Contacts	2,650	1	5/60	221
NIH LRP Coordinators	80	1	30/60	40
Total	16,220	16,220	.....	27,481

Dated: May 14, 2019.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2019–10587 Filed 5–20–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Patient-Oriented Research Review Committee.

Date: June 27–28, 2019.

Time: 8:30 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Stephanie Johnson Webb, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892, 301–827–7992, *stephanie.webb@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 15, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–10497 Filed 5–20–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Sleep Disorders Research Advisory Board.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Sleep Disorders Research Advisory Board.

Date: August 1–2, 2019.

Time: August 1, 2019, 1:00 p.m. to 5:00 p.m.

Agenda: Evaluate sleep and circadian research activities; discussion of NIH Sleep Disorders Research Plan Revision.

Place: National Institutes of Health, John Edward Porter Neuroscience Research Center, Building 35A, 35 Convent Drive, Room 640, Bethesda, MD 20892.

Telephone Access: 1–650–479–3208, Access Code: 625 290 665.

Virtual Access: WebEx Link: *https://nih.webex.com/nih/onstage/g.php?MTID=e965701a2f7ee5d98c821cd19e6d9f4b3, Event number:* 625 290 665, Event password: sdrab2019.

Time: August 2, 2019, 8:30 a.m. to 3:00 p.m.

Agenda: Coordination of inter-agency sleep research activities; discussion of NIH Sleep Disorders Research Plan Revision.

Place: National Institutes of Health, John Edward Porter Neuroscience Research Center Building. Building 35A, 35 Convent Drive, Room 640, Bethesda, MD 20892.

Telephone Access: 1–650–479–3208, Access Code: 628 903 414.

Virtual Access: WebEx Link: *https://nih.webex.com/nih/onstage/g.php?MTID=e0b5ce5a0625639571d560f8a95cceda7,* Event number: 628 903 414, Event password: sdrab2019.

Contact Person: Michael J. Twery, Ph.D., Executive Secretary, Director, National

Center on Sleep Disorders Research, National Institutes of Health, National Heart, Lung, and Blood Institute, Division of Lung Diseases, 6701 Rockledge Drive, Suite 10042, Bethesda, MD 20892, 301–435–0199, *twerym@nhlbi.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 15, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–10495 Filed 5–20–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; Single-Site and Pilot Clinical Trials Review Committee.

Date: July 15, 2019.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Carol (Chang-Sook) Kim, Ph.D., Scientific Review Administrator, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924, 301–827–7940, *carolko@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 15, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–10498 Filed 5–20–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Transition to Independence Review Committee.

Date: June 6–7, 2019.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301–435–0287, *Pintuccig@nhlbi.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 15, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–10496 Filed 5–20–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Revision of Agency Information Collection Activity Under OMB Review: Law Enforcement/Federal Air Marshal Service Physical and Mental Health Certification

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0043, abstracted below to OMB for review and approval of a revision of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves a Mental Health Certification form that applicants for the Federal Air Marshal positions are required to complete regarding their mental health history. It also includes the Practical Exercise Performance Requirements (PEPR) form and Treating Physician Status Report (TPSR) form to assist in the determination of applicants for Federal Air Marshal (FAM) positions or incumbent FAMs fitness for duty.

DATES: Send your comments by June 20, 2019. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION: TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on December 6, 2018, 83 FR 62878.

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Consistent with the requirements of Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, and E.O. 13777, Enforcing the Regulatory Reform Agenda, TSA is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

Information Collection Requirement

Title: Law Enforcement/Federal Air Marshal Service Physical and Mental Health Certification.

Type of Request: Revision of a currently approved collection.

OMB Control Number: 1652–0043.

Forms(s): TSA Form 1163, TSA Form 1164, TSA Form 1133–3.

Affected Public: Law Enforcement Officers/Federal Air Marshal Service, FAM applicants and healthcare providers.

Abstract: TSA requires that applicants for FAM positions meet certain medical standards, including whether the individual has an established medical history or clinical diagnosis of psychosis, neurosis, or any other personality or mental disorder that clearly demonstrates a potential hazard to the performance of FAM duties or the safety of self or others. Information collected on TSA Form 1164, Mental Health Certification, is used to assess the eligibility and suitability of FAM applicants who have been issued a conditional offer of employment. The collection is being revised to include the following additional forms: (1) TSA Form 1163, Treating Physician Status Report (TPSR), and (2) TSA Form 1133–1, Practical Exercise Performance Requirements (PEPR), to assist in the determination and in conjunction with further evaluation requests as needed for applicants of a FAMs position or incumbent FAMs. Additionally, TSA is revising the name of the collection from ''Office of Law Enforcement/Federal Air Marshal Service Mental Health Certification'' to ''Law Enforcement/Federal Air Marshal Service Physical and Mental Health Certification.'' Finally, TSA is also revising the collection process to allow other authorized healthcare providers to certify the applicant's or incumbent FAM's medical status, when applicable.

Number of Respondents: 600.

Estimated Annual Burden Hours: An estimated 900 hours annually.

Dated: May 15, 2019.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2019–10556 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2007–28572]

Extension of Agency Information Collection Activity Under OMB Review: Secure Flight Program

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-Day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0046, abstracted below to OMB for review and approval of an extension of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The information collection involves passenger information that certain United States aircraft operators and foreign air carriers (collectively referred to in this document as ''covered aircraft operators'') submit to Secure Flight for the purposes of identifying and protecting against potential and actual threats to transportation security. The information collection also involves individuals who are a lower risk to transportation security and therefore may be eligible for expedited screening.

DATES: Send your comments by June 20, 2019. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Information Technology (IT), TSA 11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION: TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on December 6, 2018, 83 FR 62880.

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to:

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Consistent with the requirements of Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, and E.O. 13777, Enforcing the Regulatory Reform Agenda, TSA is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

Information Collection Requirement

Title: Secure Flight Program.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0046.

Forms(s): N/A.

Affected Public: Aircraft operators, airport operators.

Abstract: TSA collects information from covered aircraft operators, including foreign air carriers, in order to prescreen passengers under the Secure Flight Program. The information collected under the Secure Flight Program is used for watchlist-matching, for matching against lists of known travelers, and to assess passenger risk (*e.g.,* to identify passengers who present lower risk and may be eligible for expedited screening). The collection covers:

(1) Secure Flight Passenger Data (SFPD) for passengers of covered domestic and international flights within, to, from, or over the continental United States, as well as flights between two foreign locations when operated by a covered U.S. aircraft operator.

(2) SFPD for passengers of charter operators and lessors of aircraft with a maximum takeoff weight of over 12,500 pounds.

(3) Certain identifying information for non-traveling individuals that airport operators or airport operator points of contact seek to authorize to enter a sterile area at a U.S. airport (*e.g.,* to patronize a restaurant, to escort a minor or a passenger with disabilities, or for another approved purpose).

(4) Registration information critical to deployment of Secure Flight, such as contact information, data format, or the mechanism the covered aircraft operators use to transmit SFPD and other data.

(5) Lists of low-risk individuals who are eligible for expedited screening provided by Federal and non-federal entities. In support of TSA Pre✓®, TSA implemented expedited screening of known or low-risk travelers. Federal and non-federal list entities provide TSA with a list of eligible low-risk individuals to be used as part of Secure Flight processes. Secure Flight identifies individuals who should receive low risk screening and transmits the appropriate boarding pass printing result to the aircraft operators.

Number of Respondents: 411.[1]

Estimated Annual Burden Hours: An estimated 67,147 hours annually.

Dated: May 15, 2019.

Christina A. Walsh,

Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2019–10555 Filed 5–20–19; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2019–N024; FXES11140100000–190–FF01E00000]

Proposed Programmatic Candidate Conservation Agreement With Assurances for the Island Marble Butterfly in San Juan County, Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an enhancement of survival (EOS) permit application from the Washington Department of Fish and Wildlife pursuant to the Endangered Species Act (ESA). The requested permit would authorize the incidental take of the island marble butterfly, proposed for listing as endangered, should the species become federally listed under the ESA. The permit application includes a proposed candidate conservation agreement with assurances (CCAA) that describes the habitat management actions that will be taken for the conservation of the island marble butterfly. We announce the availability of a draft environmental action statement addressing the CCAA and proposed permit. We invite the public to review and comment on the documents.

DATES: To ensure consideration, please submit written comments by June 20, 2019.

ADDRESSES: To request further information or submit written comments, please use one of the following methods, and note that your information request or comments are in reference to the ''Island Marble Butterfly CCAA.''

- *Internet:* Documents may be viewed or downloaded on the internet at *http://www.fws.gov/wafwo/.*
- *Email: wfwo_lr@fws.gov.*
- *U.S. Mail:* Acting State Supervisor, Public Comments Processing, Attn: FWS–R1–ES–2019–N024; U.S. Fish and Wildlife Service; 510 Desmond Drive SE, Suite 102, Lacey, WA 98503.
- *In-Person Drop-off, Viewing or Pickup:* Call 360–753–6046 to make an appointment (necessary for viewing or picking up documents only), during regular business hours at the above address. Written comments can be dropped off during regular business hours at the above address on or before the closing date of the public comment period (see **DATES**).

FOR FURTHER INFORMATION CONTACT: Tom McDowell, U.S. Fish and Wildlife Service (see **ADDRESSES**); telephone: 360–753–6046; facsimile: 360–753–9405. If you use a telecommunications device for the deaf, please call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Service has received an application from the Washington Department of Fish and Wildlife (WDFW) for an EOS permit pursuant to section 10(a)(1)(A) of the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*). The requested 15-year permit would authorize the incidental take of the island marble butterfly (*Euchloe ausonides insulanus*), which is proposed to be federally listed as endangered, in the event it becomes listed, in exchange for habitat conservation actions that are expected to provide a net conservation benefit for the species. The application includes a proposed programmatic candidate conservation agreement with assurances (CCAA) that describes the existing baseline conditions and the activities that are intended to produce a net conservation benefit for the island marble butterfly on private and county lands on San Juan and Lopez Islands in San Juan County, Washington. Non-Federal property owners may continue to enroll in this CCAA so long as the CCAA remains in effect and the island marble butterfly is not listed as endangered under the ESA.

Background

Section 9 of the ESA prohibits the ''take'' of fish and wildlife species listed as endangered or threatened. Under the ESA, the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term ''harm,'' as defined in our regulations, includes significant habitat modification or degradation that

[1] In the 60-day notice, TSA inaccurately provided the number of annual responses, 4,660,363, instead of the number of annual respondents, 411.

results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The term ''harass'' is defined in our regulations as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). Under specified circumstances, however, we may issue permits that authorize take of federally listed species, provided the take is incidental to, but not the purpose of, an otherwise lawful activity. Regulations governing permits for endangered species are at 50 CFR 17.22.

Under a CCAA, private and other non-Federal property owners voluntarily undertake management activities on their properties to enhance, restore, or maintain habitat to benefit species that are candidates or proposed for listing under the ESA. An ESA section 10(a)(1)(A) enhancement-of-survival permit is issued to the agreement participant providing a specific level of incidental take coverage should the property owner's agreed-upon conservation measures and routine property-management actions (*e.g.,* agricultural, ranching, or forestry activities) result in take of the covered species if the covered species is listed. Through a CCAA and associated enhancement of survival permit, issued pursuant to section 10(a)(1)(A) of the ESA, non-Federal property owners agree to implement conservation efforts for covered species, and the Service provides assurances to property owners that they will not be subjected to additional conservation measures nor additional land, water, or resource use restrictions beyond those the property owner voluntarily committed to under the terms of the original agreement.

Application requirements and issuance criteria for EOS permits for CCAAs are found in the Code of Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d), respectively. See also our joint policy on CCAAs, which we published in the **Federal Register** with the Department of Commerce's National Oceanic and Atmospheric Administration, National Marine Fisheries Service (64 FR 32726; June 17, 1999).

On April 12, 2018, the Service published in the **Federal Register** a proposed rule to list the island marble butterfly as endangered and to designate critical habitat for the species (83 FR 15900). In anticipation of the potential listing of the island marble butterfly under the ESA, WDFW requested assistance from the Service in developing a CCAA addressing this species on behalf of private landowners and San Juan County on San Juan and Lopez Islands, Washington.

The island marble butterfly was historically known from just two areas along the southeast coast of Vancouver Island, British Columbia, Canada: The Greater Victoria area at the southern end of Vancouver Island; and near Nanaimo and on adjacent Gabriola Island. The last known specimen of the island marble butterfly from Canada was collected in 1908 on Gabriola Island, and the species is now considered extirpated from the province. After 90 years without a documented occurrence, the island marble butterfly was rediscovered in 1998 on San Juan Island, San Juan County, Washington. Subsequent surveys in suitable habitat across southeastern Vancouver Island and the Gulf Islands in Canada, as well as the San Juan Islands and six adjacent counties in the United States (Whatcom, Skagit, Snohomish, Jefferson, Clallam, and Island counties), revealed only two other occupied areas: One on San Juan Island and another on Lopez Island. Since 2006, the number and distribution of island marble butterfly populations have declined. Habitat has been lost through conversion and degradation, particularly from agricultural and residential development, plant community succession and changes associated with invasive plants, and herbivory of host plants (and the resulting indirect predation on butterfly eggs and larvae) by deer. The island marble butterfly is presently only known to occur in a single area centered on American Camp at San Juan Island National Historical Park, including small areas of land immediately east and west adjoining the National Park. This currently occupied area is located at the southern tip of San Juan Island.

Proposed Action

The Proposed Action is issuance of a requested 15-year Permit with the option for renewal based on WDFW's commitment to implement the proposed CCAA, including issuance of certificates of inclusion to participating non-Federal landowners. The proposed CCAA would implement conservation measures that contribute to the recovery of the island marble butterfly. The take authorization under the proposed permit becomes effective if the species is listed, as long as the enrolled landowner is in compliance with the terms and conditions of their certificate of inclusion and the EOS permit. The CCAA ''emphasis areas'' are the expansive, non-forested, open areas within the agricultural and residential landscape within the central valley on San Juan Island, the central valley on Lopez Island, and areas adjacent to American Camp within the San Juan Island National Historical Park. The combined CCAA covered area totals approximately 8,800 acres. However, landowners with open areas outside of these emphasis areas may also enroll in the CCAA. Primary conservation measures implemented under the CCAA include habitat patch establishment/creation, habitat patch maintenance, habitat patch management, avoiding development of detrimental habitat, and optional deer management (fencing or lethal control). Additional conservation measures include allowing resource agency staff to monitor habitat patches and use of habitat patches by the butterfly, and to salvage/rescue the butterfly when necessary. Covered landowner activities include ongoing agricultural, ranching, recreational, and transportation use/maintenance activities, and ongoing activities associated with enrollee occupancy (*e.g.,* property management and maintenance), in addition to the implementation of CCAA conservation measures.

The draft EAS now available for public review (see **ADDRESSES**) includes a finding that the proposed CCAA and permit decision may be eligible for a categorical exclusion under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We are making the permit application package, including the proposed CCAA and draft EAS, available for public review and comment.

Public Comments

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party on our proposed Federal action, including the adequacy of the CCAA pursuant to the requirements for permits at 50 CFR parts 13 and 17, and adequacy of the EAS pursuant to NEPA.

Public Availability of Comments

All comments and materials we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your

personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety. Comments and materials we receive, as well as supporting documentation, will be available for public inspection by appointment, during normal business hours, at our Washington Fish and Wildlife Office (see **ADDRESSES**).

Authority

We provide this notice in accordance with the requirements of section 10 of the ESA (16 U.S.C. 1531 *et seq.*) and NEPA (42 U.S.C. 4321 *et seq.*), and their implementing regulations (50 CFR 17.22 and 40 CFR 1506.6, respectively).

Robyn Thorson,

Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2019–10553 Filed 5–20–19; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK940000.L14100000.BX0000 .19X.LXSS001L0100]

Filing of Plats of Survey: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), Alaska State Office, Anchorage, Alaska. These surveys were executed at the request of the Bureau of Indian Affairs (BIA) and the BLM, and are necessary for the management of these lands.

DATES: The BLM must receive protests by June 20, 2019.

ADDRESSES: You may buy a copy of the plats from the BLM Alaska Public Information Center, 222 W. 7th Avenue, Mailstop 13, Anchorage, AK 99513. Please use this address when filing written protests. You may also view the plats at the BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W. 8th Avenue, Anchorage, Alaska, at no cost.

FOR FURTHER INFORMATION CONTACT: Douglas N. Haywood, Chief, Branch of Cadastral Survey, Alaska State Office, Bureau of Land Management, 222 W. 7th Avenue, Anchorage, AK 99513; 907–271–5481; *dhaywood@blm.gov.* People who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the BLM during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

U.S. Survey No. 4117, accepted April 26, 2019, situated within:

Seward Meridian, Alaska

T. 8 N., R. 71 W.

U.S. Survey No. 5118, accepted April 30, 2019, situated within:

Seward Meridian, Alaska

T. 4 S., R. 30 W.

U.S. Survey No. 8672, accepted April 30, 2019, situated within:

Seward Meridian, Alaska

T. 4 S., R. 27 W.

U.S. Survey No. 9921, accepted April 26, 2019, situated within:

Seward Meridian, Alaska

T. 17 N., R. 56 W.

U.S. Survey No. 14465, accepted April 30, 2019, situated within:

Seward Meridian, Alaska

T. 8 S., R. 31 W.

U.S. Survey No. 14482, accepted April 30, 2019, situated within:

Seward Meridian, Alaska

T. 23 S., R. 50 W.

Copper River, Alaska

T. 73 S., R. 84 E., accepted April 30, 2019

Fairbanks Meridian, Alaska

T. 4 S., R. 8 W., accepted April 18, 2019
T. 18 S., R. 7 W., accepted April 18, 2019

Seward Meridian, Alaska

T. 5 S., R. 43 W., accepted April 18, 2019
T. 29 N., R. 1 E., accepted May 7, 2019
T. 29 N., R. 1 W., accepted May 7, 2019
T. 29 N., R. 2 E., accepted May 7, 2019
T. 29 N., R. 2 W., accepted May 7, 2019
T. 29 N., R. 3 E., accepted May 7, 2019
T. 29 N., R. 4 E., accepted May 7, 2019
T. 29 N., R. 5 E., accepted May 7, 2019
T. 29 N., R. 6 E., accepted May 7, 2019
T. 29 N., R. 7 E., accepted May 7, 2019
T. 30 N., R. 1 E., accepted May 7, 2019
T. 30 N., R. 1 W., accepted May 7, 2019
T. 30 N., R. 2 E., accepted May 7, 2019
T. 30 N., R. 2 W., accepted May 7, 2019
T. 30 N., R. 3 E., accepted May 7, 2019
T. 30 N., R. 4 E., accepted May 7, 2019
T. 30 N., R. 5 E., accepted May 7, 2019
T. 30 N., R. 6 E., accepted May 7, 2019
T. 30 N., R. 7 E., accepted May 7, 2019
T. 31 N., R. 1 E., accepted May 8, 2019
T. 31 N., R. 1 W., accepted May 8, 2019
T. 31 N., R. 2 E., accepted May 8, 2019
T. 31 N., R. 3 E., accepted May 8, 2019
T. 31 N., R. 4 E., accepted May 8, 2019
T. 31 N., R. 5 E., accepted May 8, 2019
T. 31 N., R. 6 E., accepted May 8, 2019
T. 31 N., R. 7 E., accepted May 8, 2019
T. 32 N., R. 1 E., accepted May 9, 2019
T. 32 N., R. 1 W., accepted May 9, 2019
T. 32 N., R. 2 E., accepted May 9, 2019
T. 32 N., R. 3 E., accepted May 9, 2019
T. 32 N., R. 4 E., accepted May 9, 2019
T. 32 N., R. 5 E., accepted May 9, 2019
T. 32 N., R. 6 E., accepted May 9, 2019
T. 32 N., R. 7 E., accepted May 9, 2019
T. 33 N., R. 1 E., accepted May 9, 2019
T. 33 N., R. 1 W., accepted May 9, 2019
T. 33 N., R. 2 E., accepted May 9, 2019

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the State Director for the BLM in Alaska. The notice of protest must identify the plat(s) of survey that the person or party wishes to protest. You must file the notice of protest before the scheduled date of official filing for the plat(s) of survey being protested. The BLM will not consider any notice of protest filed after the scheduled date of official filing. A notice of protest is considered filed on the date it is received by the State Director for the BLM in Alaska during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director for the BLM in Alaska within 30 calendar days after the notice of protest is filed.

If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personally identifiable information in a notice of protest or statement of reasons, you should be aware that the documents you submit, including your personally identifiable information, may be made publicly available in their entirety at any time. While you can ask the BLM to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. Chap. 3.

Douglas N. Haywood,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2019–10552 Filed 5–20–19; 8:45 am]

BILLING CODE 4310–JA–P

OFFICE OF NATURAL RESOURCES REVENUE

Major Portion Prices and Due Date for Additional Royalty Payments on Indian Gas Production in Designated Areas Not Associated With an Index Zone; Correction

AGENCY: Office of Natural Resources Revenue (ONRR).

ACTION: Notice; correction.

SUMMARY: The Office of Natural Resources Revenue published a document in the **Federal Register** of May 8, 2019. This document published the major portion prices for Indian leases and the due date for industry to pay additional royalties based on the major portion prices determined by ONRR. The document contained an incorrect date.

FOR FURTHER INFORMATION CONTACT: Luis Aguilar, (303) 231–3418.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of May 8, 2019, in FR Doc 2019–09404, on page 20162, in the third column, correct the **DATES** caption to read:

DATES: The due date to pay additional royalties based on the major portion prices is July 31, 2019.

Dated: May 15, 2019.

Gregory J. Gould,

Director for Office of Natural Resources Revenue.

[FR Doc. 2019–10520 Filed 5–20–19; 8:45 am]

BILLING CODE 4335–30–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received an amended complaint entitled *Certain Cardio-Strength Training Magnetic-Resistance Cable Exercise Machines and Components Thereof, DN 3380*; the Commission is soliciting comments on any public interest issues raised by the amended complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the amended complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received an amended complaint filed on behalf of ICON Health & Fitness, Inc. on May14, 2019. The original complaint was filed on April 11, 2019 and a notice of receipt of complaint; solicitation of comments relating to the public interest was published in the **Federal Register** on April 17, 2019. The amended complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cardio-strength training magnetic-resistance cable exercise machines and components thereof. The amended complaint names as respondents: Nautilus, Inc. of Vancouver, WA; and ZheJiang Lixuan Health Technology Co., Ltd. a/k/a Zhejiang Arcanapower Health Technology Co., Ltd. a/k/a Arcana Power Co., Ltd. of China. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the amended complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register.** There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues should be filed no later than by close of business nine calendar days after the date of publication of this notice in the **Federal Register.** Complainant may file a reply to any written submission no later than the date on which complainant's reply would be due under § 210.8(c)(2) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(c)(2)).

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by

noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3380'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: May 15, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–10483 Filed 5–20–19; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0077]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Report of Stolen or Lost ATF Form 5400.30, Intrastate Purchase Explosive Coupon

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection was previously published in the **Federal Register**, on March 18, 2019, allowing for a 60-day comment period. Comments are encouraged and will be accepted for an additional 30 days until June 20, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any other additional information, please contact: Alan Rooks, either by mail at United States Bomb Data Center (USBDC) either by mail at 3750 Corporal Road, Redstone Arsenal, AL 35898, by email at *alan.rooks@atf.gov,* or by telephone at 256–261–7580. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, without change, of a currently approved collection.

(2) *The Title of the Form/Collection:* Report of Stolen or Lost ATF Form 5400.30, Intrastate Purchase Explosive Coupon.

(3) *The agency form number, if any, and the applicable component of the Department* sponsoring the collection:

Form number: ATF Form 5400.30.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Individuals or households.

Abstract: When any Intrastate Purchase of Explosives Coupon (ATF Form 5400.30) is stolen, lost, or destroyed, the person losing possession will, upon discovery of the theft, loss, or destruction, immediately, but in all cases before 24 hours have elapsed since discovery, report the matter to the Director by telephoning 1–888–ATF–BOMB.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 10 respondents will utilize this information collection once a year and it will take each respondent approximately 20 minutes to complete their responses.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 3 hours, which is equal to 10 (# of respondents) * 1 (# of responses per respondent) * .333333 (20 mins).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice

Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: May 16, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–10589 Filed 5–20–19; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0009]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application to Register as an Importer of U.S. Munitions Import List Articles—(ATF Form 4587 (5330.4)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: The proposed information collection was previously published in the **Federal Register**, on March 18, 2019, allowing for a 60-day comment period. Comments are encouraged and will be accepted for an additional 30 days until June 20, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any other additional information, please contact Desiree M. Dickinson, ATF Firearms and Explosives Imports Branch either by mail at 244 Needy Road, Martinsburg, WV 25405, or by email at *desiree.dickinson@atf.gov,* or by telephone at 304–616–4584. Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, with change, of a currently approved collection.

(2) *The Title of the Form/Collection:* Application to Register as an Importer of U.S. Munitions Import List Articles.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 4587 (5330.4).

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Federal Government and State, Local, or Tribal Government.

Abstract: The purpose of this information collection is to allow ATF to determine if the registrant qualifies to engage in the business of importing a firearm or firearms, ammunition, and implements of war, and to facilitate the collection of registration fees.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 300 respondents will utilize the form, and it will take each respondent approximately 30 minutes to complete their responses to this form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden hours associated with this collection is 150, which is equal to 300 (# of respondents) * 1 (# of times per response) * .5 (30 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: May 16, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–10588 Filed 5–20–19; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0033]

Agency Information Collection Activities; Proposed eCollection, eComments Requested; Extension Without Change of a Previously Approved Collection; Report of Mail Order Transactions

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice, Drug Enforcement Administration (DEA), is submitting the following information collection request to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection was previously published in the **Federal Register**, on March 13, 2019, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for 30 days until June 20, 2019.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lynnette M. Wingert, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 598–6812. Written comments and/or suggestions may also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs,

Attention Department of Justice Desk Officer, Washington, DC 20503, or sent to *OIRA_submission@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information proposed to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *Title of the Form/Collection:* Report of Mail Order Transactions.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form Number: N/A. The Department of Justice component is the Drug Enforcement Administration, Diversion Control Division.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected public (Primary): Business or other for-profit.

Affected public (Other): None.

Abstract: The Drug Enforcement Administration (DEA) collects information regarding mail order transactions conducted between a person regulated by the agency and a nonregulated person (that is, someone who does not further distribute the product) involving the chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. Transactions must use, or attempt to use, the United States Postal Service or any private or commercial carrier.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

	Number of annual respondents	Number of responses per year	Number of annual responses	Average time per response (hours)	Total annual hours
Mail Order Reports	9	12	108	1	108
Total	9	N/A	108	N/A	108

6. *An estimate of the total public burden (in hours) associated with the proposed collection:* The DEA estimates that this collection takes 108 annual burden hours.

If additional information is required, please contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, Suite 3E.405B, Washington, DC 20530.

Dated: May 15, 2019.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2019–10493 Filed 5–20–19; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL CREDIT UNION ADMINISTRATION

Submission for OMB Review; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The National Credit Union Administration (NCUA) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice.

DATES: Comments should be received on or before June 20, 2019 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of this information collection, including suggestions for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.gov* and (2) NCUA PRA Clearance Officer, 1775 Duke Street, Suite 5080, Alexandria, VA 22314, or email at *PRAComments@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission may be obtained by contacting Dawn Wolfgang at (703) 548–2279, emailing *PRAComments@ncua.gov,* or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–NEW.

Type of Review: New collection.

Title: Proof of Concept Application for New Charter Organizing Groups.

Abstract: The Credit Union Resources and Expansion (CURE) office of NCUA is responsible for the review and approval of charter applications submitted by organizing groups. CURE is enhancing the application process for organizers to submit their information through an automated system to document the four most critical elements to establish a new charter. The four areas are usually the greatest challenge for organizers to accomplish. The automated system will assist organizing groups in demonstrating that they have thoroughly evaluated the proposed credit union's operations by documenting the most critical elements of a new charter, such as the purpose and core values, field of membership, capital, and subscribers.

The data will be reviewed by NCUA to determine the adequacy of a group's proof of concept and provide guidance as needed. The purpose of this information collection is to identify the level of understanding an organizing group has before they make a formal charter application submission as prescribed by Appendix B to 12 CFR part 701.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Total Annual Burden Hours: 96.

By Gerard Poliquin, Secretary of the Board, the National Credit Union Administration, on May 16, 2019.

Dated: May 16, 2019.

Dawn D. Wolfgang,

NCUA PRA Clearance Officer.

[FR Doc. 2019–10540 Filed 5–20–19; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Committee on Equal Opportunities in Science and Engineering (CEOSE) Advisory Committee Meeting (#1173).

Date and Time:

June 20, 2019; 1:00 p.m.–5:30 p.m.
June 21, 2019; 8:30 a.m.–3:30 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

To help facilitate your entry into the building, please contact Una Alford (*ualford@nsf.gov* or 703–292–7111) on or prior to June 17, 2019.

Type of Meeting: Open.

Contact Person: Dr. Bernice Anderson, Senior Advisor and CEOSE Executive Secretary, Office of Integrative Activities (OIA); National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: 703–292–8040/*banderso@nsf.gov*.

Minutes: Meeting minutes and other information may be obtained from the CEOSE Executive Secretary at the above address or the website at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp*.

Purpose of Meeting: To study data, programs, policies, and other information pertinent to the National Science Foundation and to provide advice and recommendations concerning broadening participation in science and engineering.

Agenda:

- Opening Statement and Chair Report by the CEOSE Chair
- NSF Executive Liaison Report
- Update: NSF INCLUDES (Inclusion across the Nation of Communities of Learners of Underrepresented Discovers in Engineering and Science)
- Panel: Intersectionality and STEM Diversity
- Presentations: Supporting Minority-Serving Institutions to Broaden Participation in STEM Disciplines
- Reports and Updates from the CEOSE Liaisons and Federal Liaisons
- Discussion with NSF Leadership
- Update: Broadening Participation in Computing Pilot
- Announcements

Dated: May 16, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–10575 Filed 5–20–19; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: LIGO Operations Review for the Division of Physics (1208)—LIGO Hanford Observatory Site Visit

Date and Time:

June 18, 2019; 8:30 a.m.–5:00 p.m.
June 19, 2019; 8:30 a.m.–12:00 p.m.

Place: LIGO Hanford Observatory, 127124 N. Route 10, Richland, WA 99354.

Type of Meeting: Part-Open.

Contact Person: Dr. Mark Coles, Program Director, Division of Physics, NSF, 2415 Eisenhower Avenue, Room W 9216, Alexandria, VA 22314; Telephone: (703) 292–4432.

Purpose of Meeting: Site visit to provide an evaluation of the progress of the projects at the host site for the Division of Physics at the National Science Foundation.

Agenda:

June 18, 2019

08:30 a.m.–09:00 a.m. Executive Session; CLOSED
09:00 a.m.–12:00 p.m. Presentations by LIGO; OPEN
12:00 p.m.–12:30 p.m. Lunch;
12:30 p.m.–02:30 p.m. Presentations by LIGO continued; OPEN
02:30 p.m.–04:00 p.m. Breakout sessions A and B; OPEN
04:00 p.m.–05:00 p.m. Executive Session; CLOSED

June 19, 2019

08:30 a.m.–09:00 a.m. Executive Session; CLOSED
09:00 a.m.–10:00 a.m. LIGO Q&A with panel; OPEN
10:00 a.m.–11:30 a.m. Executive Session; CLOSED
11:30 a.m.–12:00 p.m. Review Panel Report to LIGO; OPEN

Reason for Closing: The work being reviewed during closed portions of the site visit include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the project. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: May 16, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–10576 Filed 5–20–19; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Advisory Committee for International Science and Engineering (AC–ISE) Meeting (#25104).

Date and Time:

Tuesday, June 18, 2019; 9:00 a.m. to 5:00 p.m. (EST)
Wednesday, June 19, 2019; 8:00 a.m. to 12:00 p.m. (EST)

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314.

To help facilitate your entry into the NSF building, please contact Victoria Fung (*vfung@nsf.gov*) on or prior to June 13, 2019.

Type of Meeting: Open.

Contact Person: Bridget Turaga, Acting AC–ISE Executive Secretary/OISE Program Manager; National Science Foundation, 2415 Eisenhower Avenue, Alexandria, Virginia 22314; Email/Phone: *ac-ise@nsf.gov/703.292.7560*.

Purpose of Meeting: To provide advice, recommendations and counsel on major goals and policies pertaining to international programs and activities.

Agenda Summary:

- Updates on International Science and Engineering Activities
- Updates on MULTIPlying Impact Leveraging International Expertise in Research (MULTIPLIER)
- Discussion on Science and Security
- Meeting with NSF Leadership
- Updates on Strategic Visioning
- Discussion on NSF Engagement in International Multilateral Efforts
- Presentation on Convergence Accelerators

Dated: May 15, 2019.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2019–10577 Filed 5–20–19; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–30; NRC–2018–0255]

Maine Yankee Atomic Power Company; Maine Yankee Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) for its review and approval of the decommissioning funding plans submitted by Maine Yankee Atomic Power Company (MYAPC) on January 8, 2013, and December 16, 2015, for the independent spent fuel storage installation (ISFSI) at Maine Yankee in Wiscasset, Maine.

DATES: The EA and FONSI referenced in this document are available on May 21, 2019.

ADDRESSES: Please refer to Docket ID NRC–2018–0255 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0255. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the AVAILABILITY OF DOCUMENTS section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Pamela Longmire, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7465, email: *Pamela.Longmire@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the approval of the decommissioning funding plans (DFPs) for the Maine Yankee ISFSI. MYAPC submitted an initial DFP and an updated DFP for NRC review and approval by letters dated January 8, 2013 (ADAMS Accession No. ML13045A487), and December 16, 2015 (ADAMS Accession No. ML16015A050), respectively. The NRC staff has prepared a final EA (ADAMS Package Accession No. ML19126A115) in support of its review of MYAPC's DFPs, in accordance with the NRC regulations in part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' which implement the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). Based on the EA, the NRC staff has determined that approval of the DFPs for the Maine Yankee ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not warranted.

II. Environmental Assessment

Background

The Maine Yankee ISFSI is located in Wiscasset, Maine. MYAPC is authorized by the NRC, under License No. SFGL–14 to store spent nuclear fuel at the Maine Yankee ISFSI.

The NRC requires its licensees to plan for the eventual decommissioning of their licensed facilities prior to license termination. On June 17, 2011, the NRC published a final rule in the **Federal Register** amending its decommissioning planning regulations (76 FR 35512). The final rule amended the NRC regulation, 10 CFR 72.30, which concerns financial assurance and decommissioning for ISFSIs. This regulation now requires each holder of, or applicant for, a license under 10 CFR part 72 to submit, for NRC review and approval, a DFP. The purpose of the DFP is to demonstrate the licensee's financial assurance, *i.e.,* that funds will be available to decommission the ISFSI. The NRC staff is reviewing the DFPs submitted by MYAPC on January 8, 2013, and December 16, 2015. Specifically, the NRC must determine whether MYAPC's DFPs contain the information required by 10 CFR 72.30(b) and 72.30(c) and whether MYAPC has provided reasonable assurance that funds will be available to decommission the ISFSI.

Description of the Proposed Action

The proposed action is the NRC's review and approval of MYAPC's DFPs submitted in accordance with 10 CFR 72.30(b) and 72.30(c). To approve the DFPs, the NRC evaluates whether the decommissioning cost estimate (DCE) adequately estimates the cost to conduct the required ISFSI decommissioning activities prior to license termination, including identification of the volume of onsite subsurface material containing residual radioactivity that will require remediation to meet the license termination criteria in 10 CFR 20.1402 or 10 CFR 20.1403. The NRC also evaluates whether the aggregate dollar amount of MYAPC financial instruments provides adequate financial assurance to cover the DCE and that the financial instruments meet the criteria of 10 CFR 72.30(e). Finally, the NRC evaluates whether the effects of the following events have been considered in MYAPC's submittal: (1) Spills of radioactive material producing additional residual radioactivity in onsite subsurface material; (2) facility modifications; (3) changes in authorized possession limits; and (4) actual remediation costs that exceed the previous cost estimate, consistent with 10 CFR 72.30(c).

The proposed action does not require any changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require any new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of MYAPC's DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of any decontamination or decommissioning activity or license termination for the ISFSI or any other part of Maine Yankee.

Need for the Proposed Action

The proposed action provides a means for the NRC to confirm that

MYAPC will have sufficient funding to cover the costs of decommissioning the ISFSI, including the reduction of the residual radioactivity at the ISFSI to the level specified by the applicable NRC license termination regulations concerning release of the property (10 CFR 20.1402 or 10 CFR 20.1403).

Environmental Impacts of the Proposed Action

The NRC's approval of the DFPs will not change the scope or nature of the operation of the ISFSI and will not authorize any changes to licensed operations or maintenance activities. The NRC's approval of the DFPs will not result in any changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Moreover, the approval of the DFPs will not authorize any construction activity or facility modification. Therefore, the NRC staff concludes that the approval of MYAPC's DFPs is a procedural and administrative action that will not result in any significant impact to the environment.

Section 106 of the National Historic Preservation Act of 1966, as amended (54 U.S.C. 30618) (NHPA), requires Federal agencies to consider the effects of their undertakings on historic properties. In accordance with the NHPA implementing regulations at 36 CFR part 800, ''Protection of Historic Properties,'' the NRC's approval of MYAPC's DFPs constitutes a Federal undertaking. The NRC, however, has determined that the approval of the DFPs is a type of undertaking that does not have the potential to cause effects on historic properties, assuming such historic properties were present, because the NRC's approval of MYAPC's DFPs will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Therefore, in accordance with 36 CFR 800.3(a)(1), no consultation is required under Section 106 of the NHPA.

Under Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) (ESA), prior to taking a proposed action, a Federal agency must determine whether (i) endangered and threatened species or their critical habitats are known to be in the vicinity of the proposed action and if so, whether (ii) the proposed Federal action may affect listed species or critical habitats. The NRC has determined that the proposed action will have no effect on any listed species or their critical habitats because the NRC's approval of MYAPC's DFPs will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste.

Alternative to the Proposed Action

In addition to the proposed action, the NRC evaluated the no-action alternative. The no-action alternative is to deny MYAPC's DFPs. A denial of a DFP that meets the criteria of 10 CFR 72.30(b) or 72.30(c) does not support the regulatory intent of the 2011 rulemaking. As noted in the EA for the 2011 rulemaking (ADAMS Accession No. ML090500648), not promulgating the 2011 final rule would have increased the likelihood of additional legacy sites. Thus, denying MYAPC's DFPs, which the NRC has found to meet the criteria of 10 CFR 72.30(b) and 72.30(c), will undermine the licensee's decommissioning planning. On this basis, the NRC has concluded that the no-action alternative is not a viable alternative.

Agencies and Persons Consulted

The NRC staff consulted with other agencies and parties regarding the environmental impacts of the proposed action. The NRC provided a draft of its EA to the State of Maine's Division of Environmental Health, Radiation Control Program (State) by letter dated September 26, 2016 (ADAMS Accession No. ML17083A018), and gave the State 30 days to respond. The State did not respond. The NRC also consulted with the Fish and Wildlife Service by letter dated September 26, 2016 (ADAMS Accession No. ML16270A506). However, the NRC staff has determined that consultation under ESA Section 7 is not required because the proposed action is administrative/procedural in nature and will not affect listed species or critical habitat (ADAMS Accession No. ML17135A062).

III. Finding of No Significant Impact

The NRC staff has determined that the proposed action, the review and approval of MYAPC's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and 72.30(c), will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Moreover, the approval of the DFPs will not authorize any construction activity, facility modification, or any other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action and as such, that the proposed action will not have a significant effect on the quality of the human environment. Therefore, the NRC staff has determined not to prepare an EIS for the proposed action but will issue this FONSI.

IV. Availability of Documents

The following documents, related to this notice, can be found using any of the methods provided in the following table. Instructions for accessing ADAMS were provided under the **ADDRESSES** section of this document.

Date	Document	ADAMS accession No.
January 8, 2013	Submission of MYAPC decommissioning funding plan	ML13045A487
December 16, 2015	Submission of MYAPC triennial decommissioning funding plan	ML16015A050
February 1, 2009	Environmental Assessment for Final Rule—Decommissioning Planning	ML090500648
May 15, 2017	Note to File re Sct 7 Consultations for ISFSI DFPs	ML17135A062
September 26, 2016	Consultation Letter: ML16270A431–RLSO	ML17083A018
September 26, 2016	Letter to M. Miller re: U.S. Nuclear Regulatory Commission Preliminary Determination of No Effects Regarding the Yankee Nuclear Power Station Independent Spent Fuel Storage Installation Decommissioning Funding Plan.	ML16270A506
May 3, 2019	NRC staff's Final EA for the approval of the decommissioning funding plan	ML19126A115

* (Package).

Dated at Rockville, Maryland, this 16th day of May 2019.

For the Nuclear Regulatory Commission.

John McKirgan,

Chief, Spent Fuel Licensing Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–10541 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0121]

Biweekly Notice: Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Biweekly notice.

SUMMARY: Pursuant to the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued, from April 23, 2019, to May 6, 2019. The last biweekly notice was published on May 7, 2019.

DATES: Comments must be filed by June 20, 2019. A request for a hearing must be filed by July 22, 2019.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2019–0121. Address questions about NRC dockets IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lynn Ronewicz, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–1927, email: *Lynn.Ronewicz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0121, facility name, unit number(s), plant docket number, application date, and subject, when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2019–0121.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2019–0121, facility name, unit number(s), plant docket number, application date, and subject in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov,* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

III. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in § 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the

expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* Alternatively, a copy of the regulations is available at the NRC's Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to

intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *http://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click cancel when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to these license amendment applications, see the application for amendment which is available for public inspection in ADAMS and at the NRC's PDR. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

Entergy Operations, Inc.; System Energy Resources, Inc.; Cooperative Energy, A Mississippi Electric Cooperative; and Entergy Mississippi, LLC, Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Entergy Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana

Date of amendment request: March 7, 2019. A publicly-available version is in ADAMS under Accession No. ML19070A227.

Description of amendment request: The amendments would revise the Grand Gulf Nuclear Station, Unit 1, and the River Bend Station, Unit 1, Technical Specifications (TSs) Safety Limit 2.1.1.2 and TS 5.6.5, ''Core Operation Limits Report (COLR).'' The proposed changes are consistent with the NRC-approved Technical Specifications Task Force (TSTF) Traveler TSTF–564, Revision 2, ''Safety Limit MCPR [Minimum Critical Power Ratio],'' using the consolidated line item

improvement process (ADAMS Package Accession No. ML18299A048).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed amendments involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendments revise the TS SLMCPR [safety limit minimum critical power ratio] and the list of core operating limits to be included in the COLR. The SLMCPR is not an initiator of any accident previously evaluated. The revised safety limit values continue to ensure, for all accidents previously evaluated, that the fuel cladding will be protected from failure due to transition boiling. The proposed change does not affect plant operation or any procedural or administrative controls on plant operation that affect functions of preventing or mitigating any accidents previously evaluated.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed amendments create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed amendments revise the TS SLMCPR and the list of core operating limits to be included in the COLR. The proposed change will not affect the design function or operation of any structures, systems, or components (SSCs). No new equipment will be installed. As a result, the proposed change will not create any credible new failure mechanisms, malfunctions, or accident initiators not considered in the design and licensing bases.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed amendments involve a significant reduction in a margin of safety?

Response: No.

The proposed amendments revise the TS SLMCPR and the list of core operating limits to be included in the COLR. This will result in a change to a safety limit, but will not result in a significant reduction in the margin of safety provided by the safety limit. As discussed in TSTF–564, changing the SLMCPR methodology to one based on a 95% probability with 95% confidence level that no fuel rods experience transition boiling during an anticipated transient instead of the current limit based on ensuring that 99.9% of the fuel rods are not susceptible to boiling transition, does not have a significant effect on plant response to any analyzed accident. The SLMCPR and the TS Limiting Condition for Operation (LCO) on MCPR continue to provide the same level of assurance as the current limits and do not reduce margin of safety.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Anna Vinson Jones, Senior Counsel, Entergy Services, Inc., 101 Constitution Avenue NW, Suite 200 East, Washington, DC 20001.

NRC Branch Chief: Robert J. Pascarelli.

Florida Power & Light Company, et al., Docket Nos. 50–335 and 50–389, St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida

Date of amendment request: December 20, 2018. A publicly-available version is in ADAMS under Accession No. ML18354A901.

Description of amendment request: The amendments would revise the Technical Specifications (TSs) by allowing the performance of selected emergency diesel generator (EDG) surveillance requirements during power operation, and by relocating to licensee control two EDG surveillance requirements that are not necessary to demonstrate operability.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change modifies the allowable MODEs for selected EDG testing and relocates two EDG testing requirements to licensee control. EDG testing verifies the accident mitigation capabilities assumed in accident analyses. In some cases, the proposed changes could result in detectable electrical perturbations resulting from testing at-power. However, the perturbations do not exceed expected parameters or equipment capabilities, and do not trigger protective safety systems, and thereby cannot increase the likelihood of any accident. In some cases, the proposed changes could delay the ability of the EDG under test to respond to a loss of offsite power. However, the delay is insignificant, the testing would not affect redundant trains or equipment capabilities, and the plant would remain within its licensing basis in response to any postulated event. In addition, administrative controls ensure that the testing would not occur under conditions that could potentially challenge safe operation such as severe weather, etc. The testing selected for relocation to licensee control verify passive capabilities or capabilities verified during pre-operational testing that will not change without physical changes to the station. The proposed changes align the St. Lucie TS with the regulatory guidance of NUREG–1432, Revision 4, and industry precedent, and thereby cannot adversely affect safety.

Therefore, the proposed license amendments would not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change modifies the allowable MODEs for EDG testing and relocates two EDG testing requirements to licensee control. In some cases, the proposed change increases the length of time an EDG would be paralleled to the grid during power operation. During such testing, the EDG under test would be declared inoperable for a period well within the current licensing basis. Likewise, station response to any postulated event during such testing would be within its licensing basis. Hence, the proposed change would not introduce new accident initiators or new failure mechanisms and would not alter the expected outcome of any postulated event. The testing selected for relocation to licensee control verify passive equipment capabilities or capabilities verified during pre-operational testing that will not change without physical changes to the station.

Therefore, the proposed license amendments would not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change modifies the allowable MODEs for EDG testing and relocates two EDG testing requirements to licensee control. The proposed change does not affect any fission product barrier or modify any set points for which protective actions associated with accident detection or mitigation are initiated. The proposed change neither affects the design of plant equipment nor the manner in which the plant is operated. The proposed changes cannot adversely impact any safety limits or limiting safety settings.

Therefore, the proposed license amendment would not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Debbie Hendell, Managing Attorney—Nuclear, Florida Power & Light Company, 700 Universe

Blvd., MS LAW/JB, Juno Beach, FL 33408–0420.

NRC Branch Chief: Undine Shoop.

PSEG Nuclear LLC, and Exelon Generation Company, LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: April 8, 2019. A publicly-available version is in ADAMS under Accession No. ML19098B529.

Description of amendment request: The amendment would adopt Technical Specifications Task Force (TSTF) Traveler TSTF–563, ''Revise Instrument Testing Definitions to Incorporate the Surveillance Frequency Control Program.'' TSTF–563 revises the Technical Specification (TS) definitions of Channel Calibration and Channel Functional Test.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises the TS definitions of Channel Calibration and Channel Functional Test to allow the frequency for testing the components or devices in each step to be determined in accordance with the TS Surveillance Frequency Control Program. The proposed change also explicitly permits the Channel Functional Test to be performed by any series of sequential, overlapping, or total channel steps. All components in the channel continue to be calibrated and tested. The frequency at which a channel is tested or calibrated is not an initiator of any accident previously evaluated, so the probability of an accident is not affected by the proposed change. The channels surveilled in accordance with the affected definitions continue to be required to be operable and the acceptance criteria of the surveillances are unchanged. As a result, any mitigating functions assumed in the accident analysis will continue to be performed.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed change revises the TS definitions of Channel Calibration and Channel Functional Test to allow the frequency for testing the components or devices in each step to be determined in accordance with the TS Surveillance Frequency Control Program. The proposed change also explicitly permits the Channel Functional Test to be performed by any series of sequential, overlapping, or total channel steps. All components in the channel continue to be calibrated and tested. The design function or operation of the components involved are not affected and there is no physical alteration of the plant (*i.e.,* no new or different type of equipment will be installed). No credible new failure mechanisms, malfunctions, or accident initiators not considered in the design and licensing bases are introduced. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change revises the TS definitions of Channel Calibration and Channel Functional Test to allow the frequency for testing the components or devices in each step to be determined in accordance with the TS Surveillance Frequency Control Program. The proposed change also explicitly permits the Channel Functional Test to be performed by any series of sequential, overlapping, or total channel steps. All components in the channel continue to be calibrated and tested. The Surveillance Frequency Control Program assures sufficient safety margins are maintained, and that that design, operation, surveillance methods, and acceptance criteria specified in applicable codes and standards (or alternatives approved for use by the NRC) will continue to be met as described in the plants' licensing basis. The proposed change does not adversely affect existing plant safety margins, or the reliability of the equipment assumed to operate in the safety analysis. As such, there are no changes being made to safety analysis assumptions, safety limits, or limiting safety system settings that would adversely affect plant safety as a result of the proposed change. Margins of safety are unaffected by method of determining surveillance test intervals under an NRC-approved licensee-controlled program.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Steven Fleischer, PSEG Services Corporation, 80 Park Plaza, T–5, Newark, NJ 07102.

NRC Branch Chief: James G. Danna.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: April 22, 2019. A publicly-available version is in ADAMS under Accession No. ML19112A214.

Description of amendment request: The amendment would adopt Technical Specifications Task Force (TSTF) Traveler TSTF–564, Revision 2, ''Safety Limit MCPR [Minimum Critical Power Ratio],'' which would revise the Hope Creek Generating Station technical specification (TS) safety limit on minimum critical power ratio (SLMCPR) to reduce the need for cyclespecific changes to the value while still meeting the regulatory requirement for a safety limit.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment revises the TS SLMCPR and the list of individual specifications that address core operating limits to be included in the Core Operating Limits Report (COLR). The SLMCPR is not an initiator of any accident previously evaluated. The revised safety limit values continue to ensure for all accidents previously evaluated that the fuel cladding will be protected from failure due to transition boiling. The proposed change does not affect plant operation or any procedural or administrative controls on plant operation that affect the functions of preventing or mitigating any accidents previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed amendment revises the TS SLMCPR and the list of individual specifications that address core operating limits to be included in the COLR. The proposed change will not affect the design function or operation of any structures, systems or components (SSCs). No new equipment will be installed. As a result, the proposed change will not create any credible new failure mechanisms, malfunctions, or accident initiators not considered in the design and licensing bases.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed amendment revises the TS SLMCPR and the list of specifications that address core operating limits to be included in the COLR. This will result in a change to a safety limit, but will not result in a significant reduction in the margin of safety provided by the safety limit. As discussed in the application, changing the SLMCPR methodology to one based on a 95% probability with 95% confidence that no fuel rods experience transition boiling during an anticipated transient instead of the current limit based on ensuring that 99.9% of the fuel rods are not susceptible to boiling transition does not have a significant effect on plant response to any analyzed accident. The SLMCPR and the TS Limiting Condition for Operation (LCO) on MCPR continue to provide the same level of assurance as the current limits and do not reduce a margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Steven Fleischer, PSEG Services Corporation, 80 Park Plaza, T–5, Newark, NJ 07102.

NRC Branch Chief: James G. Danna.

Virginia Electric and Power Company, Docket Nos. 50–338 and 50–339, North Anna Power Station, Units Nos. 1 and 2, Louisa County, Virginia and Docket Nos. 50–280 and 50–281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia, and Dominion Energy Nuclear Connecticut, Inc., Docket Nos. 50–245, 50–336 and 50–423, Millstone Power Station, Unit Nos. 1, 2, and 3, New London County, Connecticut

Date of amendment request: January 4, 2019. A publicly-available version is in ADAMS under Package Accession No. ML19011A237.

Description of amendment request: The amendments would authorize changes to the Millstone Power Station (MPS), North Anna Power Station (NAPS), and Surry Power Station (SPS) emergency plans to incorporate new Emergency Action Level (EAL) schemes prepared using the guidelines of Nuclear Energy Institute 99–01, Revision 6, ''Methodology for the Development of Emergency Action Levels for Non-Passive Reactors,'' November 2012.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed amendments involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes affect the MPS, NAPS and SPS EALs by incorporating new EAL schemes, as well as associated revised engineering analysis, but do not alter any of the requirements of the Operating Licenses or the Technical Specifications. The proposed changes do not modify any plant equipment and do not impact any failure modes that could lead to an accident. Additionally, the proposed changes have no effect on the consequences of any analyzed accident since the changes do not affect any equipment related to accident mitigation. Based on this discussion, the proposed changes do not increase the probability or consequences of an accident previously evaluated.

2. Do the proposed amendments create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes affect the MPS, NAPS and SPS EALs by incorporating new EAL schemes, as well as associated revised engineering analysis, but do not alter any of the requirements of the Operating Licenses or the Technical Specifications. The changes do not modify any plant equipment and there are no impacts on the capability of existing equipment to perform its intended design functions. No system setpoints are being modified and no new failure modes are introduced by the proposed changes. The proposed changes do not introduce any new accident initiators or malfunctions that would cause a new or different kind of accident. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Do the proposed amendments involve a significant reduction in a margin of safety?

Response: No.

The proposed changes affect the MPS, NAPS and SPS EALs by incorporating new EAL schemes, as well as associated revised engineering analysis, but do not alter any of the requirements of the Operating Licenses or the Technical Specifications. The proposed changes do not affect any of the assumptions used in the accident analyses, nor do the proposed changes affect any operability requirements for equipment important to plant safety. Therefore, the proposed changes will not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. W. S. Blair, Senior Counsel, Dominion Energy Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: Michael T. Markley.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Unit 1, Coffey County, Kansas

Date of amendment request: March 18, 2019. A publicly-available version is in ADAMS under Accession No. ML19086A111.

Description of amendment request: The amendment would revise Technical Specification (TS) 3.3.5, ''Loss of Power (LOP) Diesel Generator (DG) Start Instrumentation.'' Specifically, the amendment would revise the degraded voltage and loss of voltage relays Allowable Values, nominal Trip Setpoints, and time delays specified in TS Surveillance Requirement 3.3.5.3, based on analysis using the guidance in Regulatory Issue Summary 2011–12, Revision 1, ''Adequacy of Station Electric Distribution System Voltages'' (ADAMS Accession No. ML113050583).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the LOV [loss of voltage] and DV [degraded voltage] Functions allows the protection scheme to function as originally designed. This change will involve alteration of the nominal Trip Setpoints in the field and will also be reflected in revisions to the surveillance procedures. The proposed change does not affect the probability or consequences of any accident.

Analysis was conducted and demonstrates that the proposed changes will allow the normally operating safety-related motors to not be damaged in the event of sustained degraded bus voltage during the time delay period prior to initiation of the first level LOV trip function. Therefore, these safety-related loads will be available to perform their design basis function should a loss-of-coolant accident (LOCA) occur concurrent with a loss-of-offsite power (LOOP) following the DV condition.

The proposed changes do not adversely affect accident initiators or precursors, and do not alter the design assumptions, conditions, or configuration or the plant or the manner in which the plant is operated or maintained. The proposed changes ensure that the 4.16kV [kilovolt] distribution system remains connected to the offsite power system when adequate offsite voltage is

available and motor starting transients are considered. During an actual LOV condition, the LOV time delay will continue to isolate the 4.16kV distribution system from offsite power before the diesel generator (DG) is ready to assume the emergency loads, which is the limiting time basis for mitigating system responses to the accident.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change involves the DV and LOV relays AV [allowable value], nominal Trip Setpoints, and time delays to satisfy existing design requirements. The proposed change does not introduce any changes or mechanisms that create the possibility of a new or different kind of accident. The proposed change does not install any new or different type of equipment, and installed equipment is not being operated in a new or different manner. No new effects on existing equipment are created nor are any new malfunctions introduced.

Therefore, the proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed changes to the DV and LOV relay AVs, nominal Trip Setpoints, and time delays continue to provide margin for the protection of equipment from sustained DV conditions. During an actual LOV condition, the LOV time delays will continue to isolate the 4.16kV distribution system from offsite power before the DG is ready to assume the emergency loads.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay Silberg, Esq., Pillsbury Winthrop Shaw Pittman LLP, 1200 17th Street NW, Washington, DC 20036.

NRC Branch Chief: Robert J. Pascarelli.

IV. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

Duke Energy Progress, LLC, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit No. 2 (Robinson), Darlington County, South Carolina

Duke Energy Progress, LLC, Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1 (Harris), Wake and Chatham Counties, North Carolina

Date of amendment request: October 19, 2017, as supplemented by letters dated June 5, October 15, and November 6, 2018.

Brief description of amendments: The amendments revised the Technical Specifications (TSs) to support the allowance of Duke Energy Progress, LLC to self-perform core reload design and safety analyses. These revisions included (1) adding the NRC-approved COPERNIC Topical Report (TR) to the list of TRs for Harris and Robinson and revised the peak fuel centerline temperature equation in Robinson TS 2.1.1.2 and Harris TS 2.1.1.b to be the equation used by COPERNIC; (2) relocating several TS parameters to the Core Operating Limits Reports for Harris and Robinson, (3) revising the Robinson TS Moderator Temperature Coefficient maximum upper limit, (4) revising the Harris TS definition of Shutdown Margin consistent with Technical Specifications Task Force (TSTF) Traveler TSTF–248, Revision 0 (ADAMS Accession No. ML040611010), ''Revise Shutdown Margin Definition for Stuck Rod Exception,'' and (5) revising the Robinson and Harris Power Distribution Limits limiting condition of operation actions and surveillance requirements, as well as the Robinson Reactor Protection System Instrumentation Table 3.3.1–1 to allow operation of a reactor core designed using the DPC–NE–2011–P [proprietary], ''Nuclear Design Methodology Report for Core Operating Limits of Westinghouse Reactors,'' methodology. (A redacted version, designated as DPC–NE–2011, is publicly-available under ADAMS Accession No. ML16125A420.)

Date of issuance: April 29, 2019.

Effective date: As of the date of issuance and shall be implemented prior to startup following the next refueling outage at each plant.

Amendment Nos.: 263 (Robinson) and 171 (Harris). A publicly-available version is in ADAMS under Accession No. ML18288A139; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–23 and NPF–63: The amendments revised the Renewed Facility Operating Licenses and TSs.

Date of initial notice in ***Federal Register:*** January 2, 2018 (83 FR 166). The supplemental letter dated November 6, 2018, provided additional information that expanded the scope of the application as originally noticed and changed the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**. Accordingly, the NRC published a second proposed no significant hazards consideration determination in the **Federal Register** on December 4, 2018 (83 FR 62613). This notice superseded the original notice in its entirety.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 29, 2019.

No significant hazards consideration comments received: No.

Duke Energy Progress, LLC, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendment request: April 4, 2018, as supplemented by letters dated May 29, 2018; September 27, 2018; and December 11, 2018.

Brief description of amendments: The amendments revised the Brunswick Steam Electric Plant, Units 1 and 2, Technical Specifications to relocate the pressure-temperature limit curves to a licensee-controlled Pressure and Temperature Limits Report (PTLR). The amendment request was submitted in accordance with guidance provided in NRC Generic Letter 96–03, ''Relocation of the Pressure Temperature Limit Curves and Low Temperature Overpressure Protections System Limits,'' dated January 31, 1996, and Technical Specifications Task Force (TSTF) Traveler TSTF–419, Revision 0, ''Revise PTLR Definition and References in ISTS 5.6.6, RCS PTLR,'' dated March 21, 2002.

Date of issuance: April 22, 2019.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment Nos.: 289 (Unit 1) and 317 (Unit 2). A publicly-available version is in ADAMS under Accession No. ML19035A006; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–71 and DPR–62: The amendments revised the Renewed Facility Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** July 17, 2018 (83 FR 33266). The supplemental letters dated September 27, 2018, and December 11, 2018, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 22, 2019.

No significant hazards consideration comments received: No.

Entergy Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1 (River Bend), West Feliciana Parish, Louisiana

Date of amendment request: February 28, 2018, as supplemented by letters dated July 10, July 24, December 17, and December 20, 2018.

Brief description of amendment: The amendment modified the River Bend Technical Specifications (TSs) to allow relocation of specific surveillance frequencies to a licensee-controlled program with the implementation of Technical Specifications Task Force (TSTF) Traveler TSTF–425, Revision 3, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF [Risk Informed TSTF] Initiative 5b.'' The amendment added a new program, the Surveillance Frequency Control Program, to TS Chapter 5.0, ''Administrative Controls,'' and required future surveillance frequency changes to be made in accordance with an NRC-approved methodology.

Date of issuance: April 29, 2019.

Effective date: As of the date of issuance and shall be implemented 90 days from the date of issuance.

Amendment No.: 196. A publicly-available version is in ADAMS under Accession No. ML19066A008; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Facility Operating License No. NPF–47: The amendment revised the Renewed Facility Operating License and TSs.

Date of initial notice in ***Federal Register:*** May 22, 2018 (83 FR 23733). The supplemental letters dated July 10, July 24, December 17, and December 20, 2018, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 29, 2019.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit 2, Pope County, Arkansas

Date of amendment request: February 6, 2018, as supplemented by letters dated March 26, September 7, and November 16, 2018.

Brief description of amendment: The amendment revised the Arkansas Nuclear One, Unit 2, Technical Specifications and operating license by relocating certain surveillance frequencies to a licensee-controlled program, consistent with the NRC-approved Technical Specifications Task Force (TSTF) Improved Standard Technical Specifications Traveler TSTF–425, Revision 3, ''Relocate Surveillance Frequencies to Licensee Control—RITSTF [Risk-Informed TSTF] Initiative 5b.''

Date of issuance: April 23, 2019.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 315. A publicly-available version is in ADAMS under Accession No. ML19063B948; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. NPF–6: The amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** June 5, 2018 (83 FR 26102). The supplemental letters dated September 7, 2018, and November 16, 2018, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 23, 2019.

No significant hazards consideration comments received: No.

Florida Power & Light Company, et al., Docket No. 50–389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of amendment request: June 29, 2018, as supplemented by letters dated August 17, 2018; November 15, 2018; and February 22, 2019.

Brief description of amendment: The amendment revised the Technical Specifications (TSs) by reducing the total number of control element assemblies specified in the TSs from 91 to 87.

Date of issuance: April 23, 2019.

Effective date: As of the date of issuance and shall be implemented prior to startup from the spring 2020 refueling outage.

Amendment No.: 198. A publicly-available version is in ADAMS under Accession No. ML19058A492; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. NPF–16: The amendment revised the Renewed Facility Operating License and TSs.

Date of initial notice in ***Federal Register:*** October 9, 2018 (83 FR 50696). The supplemental letters dated November 15, 2018, and February 22, 2019, provided additional information that clarified the application, did not

expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 23, 2019.

No significant hazards consideration comments received: No.

NextEra Energy, Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant (Point Beach), Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of amendment request: March 30, 2018, as supplemented by letter dated November 16, 2018.

Brief description of amendments: The amendments revised the Point Beach Technical Specification 5.5.15, ''Containment Leakage Rate Testing Program,'' to allow extension of the 10-year frequency of the Type A Integrated Leak Rate Test to 15 years on a permanent basis and to allow the extension of the Containment Isolation Valves leakage test interval (*i.e.,* Type C tests) from its current 60 months frequency to 75 months.

Date of issuance: April 25, 2019.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment Nos.: 265 (Unit 1) and 268 (Unit 2). A publicly-available version is in ADAMS under Accession No. ML19064A904; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–24 and DPR–27: The amendments revised the Renewed Facility Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** June 19, 2018 (83 FR 28461).

The supplemental letter dated November 16, 2018, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 25, 2019.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: March 28, 2018, as supplemented by letters dated September 26, 2018, and February 28, 2019.

Brief description of amendment: The amendment revised the Hope Creek Generating Station Technical Specification ¾.8.1, ''A.C. Sources—Operating,'' specifically, Action b, concerning one inoperable emergency diesel generator. The change removes the Salem Nuclear Generating Station, Unit 3, gas turbine generator and replaces it with portable diesel generators.

Date of issuance: April 30, 2019.

Effective date: As of the date of issuance and shall be implemented within 1 year of the date of issuance.

Amendment No.: 216. A publicly-available version is in ADAMS under Accession No. ML19073A073; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. NPF–57: The amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** June 5, 2018 (83 FR 26106). The supplemental letters dated September 26, 2018, and February 28, 2019, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 30, 2019.

No significant hazards consideration comments received: No.

South Carolina Electric & Gas Company, South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of amendment request: September 27, 2018, as supplemented by letter dated March 11, 2019.

Brief description of amendment: The amendment corrected a non-conservative Technical Specification by revising the inter-cell resistance value listed in Surveillance Requirements 4.8.2.1.b.2 and 4.8.2.1.c.3.

Date of issuance: April 30, 2019.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 215. A publicly-available version is in ADAMS under Accession No. ML19080A103; documents related to this amendment are listed in the Safety Evaluation enclosed with the amendment.

Renewed Facility Operating License No. NPF–12: The amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register:*** November 20, 2018 (83 FR 58607). The supplemental letter dated March 11, 2019, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 30, 2019.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Unit Nos. 1 and 2, Appling County, Georgia

Date of amendment request: August 6, 2018. A publicly-available version is in ADAMS under Accession No. ML18218A297.

Brief description of amendments: The amendments revise the Unit No. 1 and Unit No. 2 Technical Specifications (TS) requirements of TS 3.6.2.5, ''Residual Heat Removal (RHR) Drywell Spray,'' to allow the affected unit to remain in Hot Shutdown (Mode 3) instead of proceeding to Cold Shutdown (Mode 4) when the Required Actions of Condition C cannot be met for the drywell spray system.

Date of issuance: April 30, 2019.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment Nos.: 296 (Unit No. 1) and 241 (Unit No. 2). A publicly-available version is in ADAMS under Accession No. ML19091A291; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Renewed Facility Operating License Nos. DPR–57 and NPF–5: The amendments revised the Renewed Facility Operating Licenses and TSs.

Date of initial notice in ***Federal Register:*** December 4, 2018 (83 FR 62618).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated April 30, 2019.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant (Farley), Units 1 and 2, Houston County, Alabama, Southern Nuclear Operating Company, Inc., Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant (Hatch), Unit Nos. 1 and 2, City of Dalton, Georgia

Southern Nuclear Operating Company, Inc., Docket Nos. 50–424 and 50–425, Vogtle Electric Generating Plant (Vogtle), Units 1 and 2, Burke County, Georgia

Date of amendment request: August 9, 2018, as supplemented by letter dated January 31, 2019.

Brief description of amendments: The amendments revised Technical Specification (TS) 5.2.2.g to eliminate a dedicated shift technical advisor (STA) position at Farley, Units 1 and 2, and Hatch, Units 1 and 2, by allowing the STA functions to be combined with one or more of the required senior licensed operator positions. The Vogtle, Units 1 and 2, TS change aligns the facilities with equivalent wording. This change also incorporated wording related to the modes of operation during which the individual meeting the requirements in TS 5.2.2.g is required and provided guidance that the same individual may provide advisory technical support for both units.

Date of issuance: April 26, 2019.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment Nos.: Farley—222 (Unit 1) and 219 (Unit 2); Hatch—295 (Unit 1) and 240 (Unit 2); and Vogtle—199 (Unit 1) and 182 (Unit 2). A publicly-available version is in ADAMS under Accession No. ML19064A774; documents related to these amendments are listed in the Safety Evaluation enclosed with the amendments.

Facility Operating License Nos. NPF–2, NPF–5, NPF–8, NPF–68, NPF–81, and DPR–57: The amendments revised the Facility Operating Licenses and TSs.

Date of initial notice in ***Federal Register:*** October 23, 2018 (83 FR 53515). The supplemental letter dated January 31, 2019, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated April 26, 2019.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 14th day of May 2019.

For the Nuclear Regulatory Commission.

Craig G. Erlanger,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–10315 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–409; NRC–2019–0120]

LaCrosse Solutions, LLC; La Crosse Boiling Water Reactor, Vernon County, Wisconsin

AGENCY: Nuclear Regulatory Commission.

ACTION: Final environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering an amendment to Possession Only License DPR–45 to add a license condition that reflects the NRC's approval of the license termination plan (LTP) for the La Crosse Boiling Water Reactor (LACBWR) and provides criteria for when prior NRC approval is needed to make changes to the LTP. The NRC has prepared a final environmental assessment (EA) and finding of no significant impact (FONSI) for this licensing action.

DATES: The final EA referenced in this document was available on May 6, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0120 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2019–0120. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Marlayna Vaaler, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–3178, email: *Marlayna.Vaaler@nrc.gov;* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

In June 2016, LaCrosse*Solutions,* LLC (LS, the licensee) submitted a license amendment request, which included the LTP for LACBWR. The LTP was updated by LS in December 2016, May 2018, and November 2018. The NRC is considering amending Possession Only License DPR–45 to add a license condition that reflects the NRC's approval of the LTP and provides criteria for when prior NRC approval is needed to make changes to the LTP. As required by of title 10 of the *Code of Federal Regulations* (10 CFR) part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' the NRC prepared a final EA. Based on the results of the final EA, as described in the following sections, the NRC has determined not to prepare an environmental impact statement (EIS) for the LACBWR LTP amendment, and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action is NRC review and approval of the LACBWR LTP. In its license amendment request, LS requested to add a license condition: (1) Reflecting the NRC staff's approval of the LTP and (2) providing criteria for when prior NRC approval is needed to make changes to the LTP. If the NRC approves the LTP, the approval will be issued in the form of an amendment to the LACBWR license to add the requested license condition.

The LACBWR LTP provides the details of the plan for characterizing, identifying, and remediating the remaining residual radioactivity at the LACBWR site to a level that will allow the site to be released for unrestricted use. The LACBWR LTP also describes

how the licensee will confirm the extent and success of remediation through radiological surveys, provide financial assurance to complete decommissioning, and ensure the environmental impacts of the decommissioning activities are within the scope originally envisioned in the associated environmental documents. The LTP outlines the remaining decommissioning and dismantling activities; decommissioning activities at the LACBWR site are scheduled to be complete in 2019, with license termination occurring before the end of 2020.

Need for the Proposed Action

The purpose of and need for the proposed action is to allow for completion of decommissioning of the LACBWR site by the licensee, the termination of the LACBWR license by the NRC, and the subsequent release of the LACBWR site for unrestricted use. The NRC will terminate the license if it determines that the site meets the performance-based criteria for unrestricted site release, in accordance with 10 CFR 20.1402, ''Radiological Criteria for Unrestricted Use,'' and that the facility has been dismantled in accordance with the LTP.

Environmental Impacts of the Proposed Action

The NRC assessed the environmental impacts of the license termination activities and remaining decommissioning activities and determined there would be no significant impact to the quality of the human environment.

During its review of the LACBWR LTP, the NRC concluded the impacts for most resource areas—land use, air quality, ecology, socioeconomics, historic and cultural resources, aesthetics, noise, and transportation—were still bounded by the previously issued Decommissioning Generic Environmental Impact Statement (GEIS). Therefore, the NRC does not expect impacts beyond those discussed in the GEIS, which concluded that the impact level for these issues was SMALL.

In the EA associated with the LACBWR LTP, the NRC evaluated the potential site-specific environmental impacts of the remaining decommissioning and license termination activities on climate change, water resources, environmental justice, and waste management and did not identify any significant impacts. For protected species, the NRC determined that the proposed action may affect but not likely to adversely affect the Higgins eye pearlymussel (*Lampsilis higginsii*), the sheepnose mussel (*Plethobasus cyphyus*), and the northern long-eared bat (*Myotis septentrionalis*).

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). Under the no-action alternative, the NRC would not approve the LACBWR LTP or the license amendment request because regulatory requirements have not been met. Consequently, the LACBWR license would not be terminated, decommissioning and other onsite maintenance and operational activities involving the storage of spent nuclear fuel would continue, and the remainder of the LACBWR site would not be released for unrestricted use. If the NRC was unable to approve the LACBWR LTP because the regulatory requirements were not met, then the licensee would have to take the necessary actions to ensure the regulations are met.

Agencies and Persons Consulted

On December 19, 2018, the NRC staff sent a copy of the draft EA associated with the LACBWR LTP to the Wisconsin Department of Health (WDHS) for review and comment. The WDHS responded on January 29, 2019, with no comment.

The NRC consulted with the U.S. Fish and Wildlife Service (FWS) on listed protected species at the LACBWR site. On December 20, 2018, the NRC requested FWS review and concurrence with the NRC's determination that the proposed action may affect, but is not likely to adversely affect three federally listed species. FWS concurred with the NRC's determination on January 30, 2019.

The NRC also made a determination that no historic properties would be affected, and on December 20, 2018, requested the Wisconsin State Historical Society's concurrence on the finding. The State Historical Society concurred with the NRC's finding on February 4, 2019.

III. Finding of No Significant Impact

Based on its review of the proposed action, and in accordance with the requirements in 10 CFR part 51, the NRC staff has determined that pursuant to 10 CFR 51.31, ''Determinations based on environmental assessment,'' preparation of an EIS is not required for the proposed action and, pursuant to 10 CFR 51.32, ''Finding of no significant impact,'' a FONSI is appropriate.

On the basis of the final EA, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an EIS for the proposed action.

IV. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document and date	ADAMS Accession Nos./weblink
License Amendment Request June 27, 2016	ML16200A095.
Supplemented LTP December 1, 2016	ML16347A026.
LTP Revision 1 May 31, 2018	ML18169A271 ML18169A235.
LTP Final Consolidated November 15, 2018	ML18331A023.
Final EA	ML19031B926.
NUREG–0586, Supplement 1 Decommissioning GEIS	*https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0586/.*
Transmittal of Draft EA to WDHS December 19, 2018	ML18354B000.
WDHS Comments on Draft EA January 29, 2019	ML19031B159.
Transmittal of Draft EA to FWS December 19, 2018	ML18351A258.
FWS Response January 30, 2019	ML19031B157.
Transmittal of Draft EA to WSHS December 19, 2018	ML18351A219.
WHS Response February 9, 2019	ML19043A773.

Dated at Rockville, Maryland, on May 15, 2019.

For the Nuclear Regulatory Commission.

Andrew J. Pretzello,

Deputy Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–10488 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of May 20, 27, June 3, 10, 17, 24, 2019.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of May 20, 2019

There are no meetings scheduled for the week of May 20, 2019.

Week of May 27, 2019—Tentative

Thursday, May 30, 2019

9:00 a.m.

Briefing on Nuclear Regulatory Research Program (Public Meeting) (Contact: Nicholas DiFrancesco: 301–415–1115).

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of June 3, 2019—Tentative

There are no meetings scheduled for the week of June 3, 2019.

Week of June 10, 2019—Tentative

There are no meetings scheduled for the week of June 10, 2019.

Week of June 17, 2019—Tentative

Tuesday, June 18, 2019

10:00 a.m.

Briefing on Human Capital and Equal Employment Opportunity (Public Meeting) (Contact: Jason Lising: 301–287–0569)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Thursday, June 20, 2019

10:00 a.m.

Briefing on Results of the Agency Action Review Meeting (Public Meeting) (Contact: Andrea Mayer: 301–415–1081)

This meeting will be webcast live at the Web address—*http://www.nrc.gov/.*

Week of June 24, 2019—Tentative

There are no meetings scheduled for the week of June 24, 2019.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.* The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Kimberly Meyer-Chambers, NRC Disability Program Manager, at 301–287–0739, by videophone at 240–428–3217, or by email at *Kimberly.Meyer-Chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or by email at *Wendy.Moore@nrc.gov.*

Dated at Rockville, Maryland, this 17th day of May, 2019.

For the Nuclear Regulatory Commission.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2019–10699 Filed 5–17–19; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–461; NRC–2019–0123]

Exelon Generation Company, LLC; Clinton Power Station, Unit No. 1

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an amendment to Facility Operating License No. NPF–62, issued to Exelon Generation Company, LLC (the licensee), for operation of the Clinton Power Station, Unit No 1 (CPS), located in DeWitt County, Illinois. The proposed action would amend the expiration of Facility Operating License No. NPF–62 from September 29, 2026, to April 17, 2027. From September 29, 1986, to April 17, 1987, CPS was limited to 5 percent of rated power while operators conducted low-power testing before being issued a full-power operating license on April 17, 1987. The action to amend the expiration date of the license from September 29, 2026, to April 17, 2027, would result in the license expiring 40 years from the date of the issuance of the full-power operating license, as is permitted by the NRC's regulations.

DATES: The environmental assessment (EA) and finding of no significant impact (FONSI) referenced in this document is available on May 21, 2019.

ADDRESSES: Please refer to Docket ID NRC–2019–0123 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2019–0123. Address questions about NRC docket IDs to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Joel S. Wiebe, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6606; email: *Joel.Wiebe@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the issuance of an amendment to Facility Operating License No. NPF–62, issued to Exelon Generation Company, LLC (the licensee), for operation of the Clinton Power Station, Unit No. 1 (CPS), located in DeWitt County, Illinois. The licensee requested the amendment by letter dated September 17, 2018 (ADAMS Accession No. ML18260A307). If approved, the amendment would revise the expiration date of the license such that it would expire 40 years from the date of the issuance of the full-power operating license, as is permitted by title 10 of the *Code of Federal Regulations* (10 CFR) 50.51. In accordance with 10 CFR 51.21, the NRC prepared the following EA that analyzes the environmental impacts of the proposed licensing action. Based on the results of this EA, and in accordance with 10 CFR 51.31(a), the NRC has determined not to prepare an environmental impact statement for the proposed licensing action and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would revise the expiration date of the license such that it would expire 40 years from the date of the issuance of the full-power operating license, as is permitted by 10 CFR 50.51. Specifically, the proposed action would revise the expiration date of the Facility Operating License No. NPF–62 from September 29, 2026, to April 17, 2027, which is 40 years from the issuance of the full-power operating license on April 17, 1987.

The proposed action is also described in the licensee's application dated September 17, 2018.

Need for the Proposed Action

On September 29, 1986, the NRC issued a low-power testing license (No. NPF–55) that authorized the licensee to operate CPS at up to 5 percent of rated power. On April 17, 1987, the NRC issued a full-power operating license (No. NPF–62) that authorized the licensee to operate CPS at up to 100 percent of rated power, with an expiration date 40 years from the date of the issuance of the low-power license.

The proposed action would allow the licensee to recapture the approximately 6.5 month period of low-power operation and extend the license expiration date to April 17, 2027. This action is consistent with NRC policy established in the Staff Requirements Memorandum (SRM) for SECY–98–296, ''Staff Requirements—SECY–98–296—Agency Policy Regarding Licensee Recapture of Low-Power Testing or Shutdown Time for Nuclear Power Plants,'' dated March 30, 1999 (available at *www.nrc.gov/reading-rm/doc-collections/commission/srm/1998/1998-296srm.pdf*). SECY–98–296, ''Agency Policy Regarding Licensee Recapture of Low-Power Testing or Shutdown Time for Nuclear Power Plants,'' dated December 21, 1998, is available at *www.nrc.gov/reading-rm/doc-collections/commission/secys/1998/secy1998-296/1998-296scy.pdf.*

Environmental Impacts of the Proposed Action

The proposed action would amend the CPS license such that it would expire 40 years from the date of the issuance of the facility's full-power operating license.

NUREG–0854, ''Final Environmental Statement Related to the Operation of Clinton Power Station, Unit No.1,'' dated May 1982 (ADAMS Accession No. ML19079A225), concluded that CPS will most likely operate with only minimal environmental impact. The proposed action would not affect the design or operation of the plant, and would not involve any modifications to the plant or any increase in the licensed power for the plant. Similarly, the proposed action would not significantly increase the probability or consequences of accidents or change the types of effluents released offsite. Because the proposed approximately 6.5 month extension of operation represents only a small fraction of the 40 year operating life considered in NUREG–0854, there would be no significant increase in the amount of any effluent released or waste generated, and no significant increase in occupational or public radiation exposure. The nominal additional quantities of effluents and waste generated during the proposed approximately 6.5 month period of extension would be in accordance with current operating requirements and regulatory limits. Therefore, the NRC concludes that there would be no significant radiological or nonradiological environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC considered denial of the license amendment request (*i.e.,* the ''no-action'' alternative). Denial of the license amendment request would result in no change in current environmental impacts. Accordingly, the environmental impacts of the proposed action and the no-action alternative would be similar.

Alternative Use of Resources

There are no unresolved conflicts concerning alternative uses of available resources under the proposed action.

Agencies or Persons Consulted

No additional agencies or persons were consulted regarding the environmental impact of the proposed action. However, in accordance with 10 CFR 50.91, the licensee provided copies of its application to the State of Illinois, and the NRC staff will consult with this State prior to issuance of the amendment.

III. Finding of No Significant Impact

The licensee has requested an amendment to revise the expiration date of the CPS license such that it would expire 40 years from the date of the issuance of the full-power operating license, as is permitted by 10 CFR 50.51. Specifically, the proposed action would revise the expiration date of Facility Operating License No. NPF–62 from September 29, 2026, to April 17, 2027, which is 40 years from the issuance of the full-power operating license on April 17, 1987.

The proposed action is in accordance with the licensee's application dated September 17, 2018.

The NRC is considering issuing the requested amendment. The proposed action would not significantly affect plant safety, would not have a significant adverse effect on the probability of an accident occurring, and would not have any significant radiological or nonradiological impacts. The reason the human environment would not be significantly affected is that the proposed action would not involve any construction or modification of the facility. Consistent with 10 CFR 51.21, the NRC conducted the EA for the proposed action, and this FONSI incorporates by reference the EA in Section II of this notice. Therefore, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

As required by 10 CFR 51.32(a)(5), the related environmental document which provides the latest description of environmental conditions at CPS is NUREG–0854.

This FONSI and other related environmental documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR),

located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Publicly-available records are also accessible electronically from the ADAMS Public Electronic Reading Room on the internet at the NRC's website: *http://www.nrc.gov/reading-rm/adams.html.*

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 16th day of May 2019.

For the Nuclear Regulatory Commission.

Joel S. Wiebe,

Senior Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–10549 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–334, 50–346; NRC–2017–0169]

FirstEnergy Nuclear Operating Company; Beaver Valley Power Station, Unit No. 1, Davis-Besse Nuclear Power Station, Unit No. 1

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; withdrawal by applicant.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has granted the request of FirstEnergy Nuclear Operating Company, et al., dated May 8, 2019, to withdraw its application dated May 18, 2017, as supplemented by letter dated August 23, 2018, for proposed amendments to Renewed Facility Operating License No. DPR–66 for the Beaver Valley Power Station, Unit No. 1 (BVPS–1), and to Renewed Facility Operating License No. NPF–3 for the Davis-Besse Nuclear Power Station, Unit No. 1 (DBNPS). The proposed amendments would have modified the BVPS–1 and DBNPS Renewed Facility Operating Licenses to reflect that FirstEnergy Solutions Corp. is providing the $400 million support agreement instead of FirstEnergy Corp.

DATES: May 21, 2019.

ADDRESSES: Please refer to Docket ID NRC–2017–0169 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

• *Federal Rulemaking website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0169. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

FOR FURTHER INFORMATION CONTACT: Bhalchandra K. Vaidya, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3308, email: *Bhalchandra.Vaidya@nrc.gov.*

• *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

SUPPLEMENTARY INFORMATION: The NRC has granted the request of FirstEnergy Nuclear Operating Company (FENOC) (the licensee) dated May 8, 2019 (ADAMS Accession No. ML19128A076), to withdraw its May 18, 2017, application, as supplemented by letter dated August 23, 2018 (ADAMS Accession Nos. ML17138A381 and ML18235A194, respectively), for proposed amendment to Renewed Facility Operating License No. DPR–66 for the BVPS–1, and to Renewed Facility Operating License No. NPF–3 for DBNPS. The proposed amendment would have modified the BVPS–1 and DBNPS Renewed Facility Operating Licenses to reflect that FirstEnergy Solutions Corp. is providing the $400 million support agreement instead of FirstEnergy Corp.

FENOC's May 18, 2017, request was noticed in the **Federal Register** on August 1, 2017 (82 FR 35840).

Dated at Rockville, Maryland, this 16th day of May 2019.

For the Nuclear Regulatory Commission.

Bhalchandra K. Vaidya,

Project Manager, Plant Licensing Branch III, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2019–10545 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–74; NRC–2018–0259]

Luminant Generation Company, LLC; Comanche Peak Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) for its review and approval of the decommissioning funding plans submitted by Luminant Generation Company, LLC (Luminant Power) on March 28, 2013, and March 31, 2015, for the independent spent fuel storage installation (ISFSI) at Comanche Peak in Glen Rose, Texas.

DATES: The EA and FONSI referenced in this document are available on May 21, 2019.

ADDRESSES: Please refer to Docket ID NRC–2018–0259 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

• *Federal Rulemaking Website:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2018–0259. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the

reader, instructions about obtaining materials referenced in this document are provided in the Availability of Documents section.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Pamela Longmire, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7465, email: *Pamela.Longmire@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the approval of the decommissioning funding plans (DFPs) for the Comanche Peak ISFSI. Luminant Power submitted an initial DFP and an updated DFP for NRC review and approval by letters dated March 28, 2013 (ADAMS Accession No. ML13136A221), and March 31, 2015 (ADAMS Accession No. ML15103A281), respectively. The NRC staff has prepared a final EA (ADAMS Accession No. ML19120A336) in support of its review of Luminant Power's DFPs, in accordance with the NRC regulations in part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' which implement the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). Based on the EA, the NRC staff has determined that approval of the DFPs for the Comanche Peak ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement (EIS) is not warranted.

II. Environmental Assessment

Background

The Comanche Peak ISFSI is located in Glen Rose, Texas. Luminant Power is authorized by the NRC, under License No. SFGL–50 to store spent nuclear fuel at the Comanche Peak ISFSI.

The NRC requires its licensees to plan for the eventual decommissioning of their licensed facilities prior to license termination. On June 17, 2011, the NRC published a final rule in the **Federal Register** amending its decommissioning planning regulations (76 FR 35512). The final rule amended the NRC regulation, 10 CFR 72.30, which concerns financial assurance and decommissioning for ISFSIs. This regulation now requires each holder of, or applicant for, a license under 10 CFR part 72 to submit, for NRC review and approval, a DFP. The purpose of the DFP is to demonstrate the licensee's financial assurance, *i.e.,* that funds will be available to decommission the ISFSI. The NRC staff is reviewing the DFPs submitted by Luminant Power on March 28, 2013, and March 31, 2015. Specifically, the NRC must determine whether Luminant Power's DFPs contain the information required by 10 CFR 72.30(b) and 72.30(c) and whether Luminant Power has provided reasonable assurance that funds will be available to decommission the ISFSI.

Description of the Proposed Action

The proposed action is the NRC's review and approval of Luminant Power's DFPs submitted in accordance with 10 CFR 72.30(b) and 72.30(c). To approve the DFPs, the NRC evaluates whether the decommissioning cost estimate (DCE) adequately estimates the cost to conduct the required ISFSI decommissioning activities prior to license termination, including identification of the volume of onsite subsurface material containing residual radioactivity that will require remediation to meet the license termination criteria in 10 CFR 20.1402 or 10 CFR 20.1403. The NRC also evaluates whether the aggregate dollar amount of Luminant Power financial instruments provides adequate financial assurance to cover the DCE and that the financial instruments meet the criteria of 10 CFR 72.30(e). Finally, the NRC evaluates whether the effects of the following events have been considered in Luminant Power's submittal: (1) Spills of radioactive material producing additional residual radioactivity in onsite subsurface material; (2) facility modifications; (3) changes in authorized possession limits; and (4) actual remediation costs that exceed the previous cost estimate, consistent with 10 CFR 72.30(c).

The proposed action does not require any changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require any new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of Luminant Power's DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of any decontamination or decommissioning activity or license termination for the ISFSI or any other part of Comanche Peak.

Need for the Proposed Action

The proposed action provides a means for the NRC to confirm that Luminant Power will have sufficient funding to cover the costs of decommissioning the ISFSI, including the reduction of the residual radioactivity at the ISFSI to the level specified by the applicable NRC license termination regulations concerning release of the property (10 CFR 20.1402 or 10 CFR 20.1403).

Environmental Impacts of the Proposed Action

The NRC's approval of the DFPs will not change the scope or nature of the operation of the ISFSI and will not authorize any changes to licensed operations or maintenance activities. The NRC's approval of the DFPs will not result in any changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Moreover, the approval of the DFPs will not authorize any construction activity or facility modification. Therefore, the NRC staff concludes that the approval of Luminant Power's DFPs is a procedural and administrative action that will not result in any significant impact to the environment.

Section 106 of the National Historic Preservation Act of 1966, as amended (54 U.S.C. 30618) (NHPA), requires Federal agencies to consider the effects of their undertakings on historic properties. In accordance with the NHPA implementing regulations at 36 CFR part 800, ''Protection of Historic Properties,'' the NRC's approval of Luminant Power's DFPs constitutes a Federal undertaking. The NRC, however, has determined that the approval of the DFPs is a type of undertaking that does not have the potential to cause effects on historic properties, assuming such historic properties were present, because the NRC's approval of Luminant Power's DFPs will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Therefore, in accordance with 36 CFR 800.3(a)(1), no consultation is required under Section 106 of the NHPA.

Under Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) (ESA), prior to taking a proposed action, a Federal agency must determine

whether (i) endangered and threatened species or their critical habitats are known to be in the vicinity of the proposed action and if so, whether (ii) the proposed Federal action may affect listed species or critical habitats. The NRC has determined that the proposed action will have no effect on any listed species or their critical habitats because the NRC's approval of Luminant Power's DFPs will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste.

Alternative to the Proposed Action

In addition to the proposed action, the NRC evaluated the no-action alternative. The no-action alternative is to deny Luminant Power's DFPs. A denial of a DFP that meets the criteria of 10 CFR 72.30(b) or 72.30(c) does not support the regulatory intent of the 2011 rulemaking. As noted in the EA for the 2011 rulemaking (ADAMS Accession No. ML090500648), not promulgating the 2011 final rule would have increased the likelihood of additional legacy sites. Thus, denying Luminant Power's DFPs, which the NRC has found to meet the criteria of 10 CFR 72.30(b) and 72.30(c), will undermine the licensee's decommissioning planning. On this basis, the NRC has concluded that the no-action alternative is not a viable alternative.

Agencies and Persons Consulted

The NRC staff consulted with other agencies and parties regarding the environmental impacts of the proposed action. The NRC provided a draft of its EA to the Office of the Governor of the State of Texas, Office of Budget and Policy (State) by letter dated July 15, 2016 (ADAMS Accession No. ML17139B989), and gave the State 30 days to respond. The State did not respond. The NRC also consulted with the Fish and Wildlife Service by letter dated July 15, 2016 (ADAMS Accession No. ML16197A054). However, the NRC staff has determined that consultation under ESA Section 7 is not required because the proposed action is administrative/procedural in nature and will not affect listed species or critical habitat (ADAMS Accession No. ML17135A062).

III. Finding of No Significant Impact

The NRC staff has determined that the proposed action, the review and approval of Luminant Power's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and 72.30(c), will not authorize or result in changes to licensed operations or maintenance activities, or changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of any solid waste. Moreover, the approval of the DFPs will not authorize any construction activity, facility modification, or any other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action and as such, that the proposed action will not have a significant effect on the quality of the human environment. Therefore, the NRC staff has determined not to prepare an EIS for the proposed action but will issue this FONSI.

IV. Availability of Documents

The following documents, related to this notice, can be found using any of the methods provided in the following table. Instructions for accessing ADAMS were provided under the **ADDRESSES** section of this document.

Date	Document	ADAMS Accession No.
March 28, 2013	Submission of Luminant Power decommissioning funding plan	ML13136A221
March 31, 2015	Submission of Luminant Power triennial decommissioning funding plan	ML15103A281
February 1, 2009	Environmental Assessment for Final Rule—Decommissioning Planning	ML090500648
May 15, 2017	Note to File re Sct 7 Consultations for ISFSI DFPs	ML17135A062
July 15, 2016	Consultation Letter: ML16197A131–RLSO	ML17139B989
July 15, 2016	Letter to S. Jacobsen re: U.S. Nuclear Regulatory Commission Preliminary Determination of No Effects Regarding the Comanche Peak Nuclear Power Plant Units 1 and 2 Independent Spent Fuel Storage Installation Decommissioning Funding Plan.	ML16197A054
April 26, 2019	NRC staff's Final EA for the approval of the decommissioning funding plan	ML19120A336

Dated at Rockville, Maryland, on May 15, 2019.

For the Nuclear Regulatory Commission.

John McKirgan,

Chief, Spent Fuel Licensing Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2019–10519 Filed 5–20–19; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

President's Commission on White House Fellowships Advisory Committee: Closed Meeting

AGENCY: President's Commission on White House Fellowships, Office of Personnel Management.

ACTION: Notice of meeting.

SUMMARY: The President's Commission on White House Fellowships (PCWHF) was established by an Executive Order in 1964. The PCWHF is an advisory committee composed of Special Government Employees appointed by the President. The Advisory Committee meets in June to interview potential candidates for recommendation to become a White House Fellow.

The meeting is closed.

Name of Committee: President's Commission on White House Fellowships Selection Weekend.

Date: June 7–10, 2019.

Time: 8:00 a.m.–5:30 p.m.

Place: St. Regis Hotel, 16th and K Street, Washington, DC 20006.

Agenda: The Commission will interview 30 National Finalists for the selection of the new class of White House Fellows.

FOR FURTHER INFORMATION CONTACT: Elizabeth D. Pinkerton, 712 Jackson Place NW, Washington, DC 20503, Phone: 202–395–4522.

President's Commission on White House Fellowships.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2019–10517 Filed 5–20–19; 8:45 am]

BILLING CODE 6325–44–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2019–151]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* May 23, 2019.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2019–151; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Reseller Expedited Package 2 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* May 15, 2019; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* May 23, 2019.

This Notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2019–10531 Filed 5–20–19; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85863; File No. SR–OCC–2019–802]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice Related to the Introduction of a New Liquidation Cost Model in The Options Clearing Corporation's Margin Methodology

May 15, 2019.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'')[1] and Rule 19b–4(n)(1)(i)[2] under the Securities Exchange Act of 1934 (''Exchange Act''),[3] notice is hereby given that on April 18, 2019, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') an advance notice (''Advance Notice'') as described in Items I, II and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the advance notice from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice is submitted in connection with proposed changes to OCC's Margins Methodology, Margin Policy, and Stress Testing and Clearing Fund Methodology Description to add a risk-based liquidation charge based on bid-ask spreads to adjust the value of positions to account for the costs of liquidating a defaulting Clearing Member's portfolio. The proposed changes to OCC's Margins Methodology, Margin Policy, and Stress Testing and Clearing Fund Methodology Description are contained in confidential Exhibits 5A–5C of the filing. Material proposed to be added is marked by underlining and material proposed to be deleted is marked by strikethrough text. OCC also has included a summary of impact analysis of the proposed model changes in confidential Exhibit 3. The proposed changes are described in detail in Item II below.

The advance notice is available on OCC's website at *https://www.theocc.com/about/publications/bylaws.jsp.* All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[4]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the advance notice and discussed any comments it received on the advance notice. The text of these statements may be examined at the places specified in Item IV below.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] OCC's By-Laws and Rules can be found on OCC's public website: *http://optionsclearing.com/about/publications/bylaws.jsp.*

OCC has prepared summaries, set forth in sections A and B below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the advance notice and none have been received. OCC will notify the Commission of any written comments received by OCC.

(B) Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing, and Settlement Supervision Act

Description of the Proposed Change

Background

OCC's margin methodology, the System for Theoretical Analysis and Numerical Simulations (''STANS''), is OCC's proprietary risk management system that calculates Clearing Member margin requirements.[5] STANS utilizes large-scale Monte Carlo simulations to forecast price and volatility movements in determining a Clearing Member's margin requirement.[6] The STANS margin requirement is calculated at the portfolio level of Clearing Member legal entity marginable net positions tier account (tiers can be customer, firm, or market marker) and consists of an estimate of a 99% 2-day expected shortfall (''99% Expected Shortfall'') and an add-on for model risk (the concentration/dependence stress test charge). The STANS methodology is used to measure the exposure of portfolios of options and futures cleared by OCC and cash instruments in margin collateral.

STANS margin requirements are comprised of the sum of several components, each reflecting a different aspect of risk. The base component of the STANS margin requirement for each account is obtained using a risk measure known as 99% Expected Shortfall. Under the 99% Expected Shortfall calculation, an account has a base margin excess (deficit) if its positions in cleared products, plus all existing collateral—whether of types included in the Monte Carlo simulation or of types subjected to traditional ''haircuts''—would have a positive (negative) net worth after incurring a loss equal to the average of all losses beyond the 99% value at risk (or ''VaR'') point. This base component is then adjusted by the addition of a stress test component, which is obtained from consideration of the increases in 99% Expected Shortfall that would arise from market movements that are especially large and/or in which various kinds of risk factors exhibit perfect or zero correlations in place of their correlations estimated from historical data, or from extreme adverse idiosyncratic movements in individual risk factors to which the account is particularly exposed.[7] STANS margin requirements are intended to cover potential losses due to price movements over a two-day risk horizon; however, the base and stress margin components do not cover the potential liquidation costs OCC may incur in closing out a defaulted Clearing Member's portfolio.[8] Closing out positions in a defaulted Clearing Member's portfolio could entail selling longs at bid price and covering shorts at ask price. This means that additional liquidation costs may need to take into account the bid-ask price spreads.

Proposed Changes

OCC is proposing to enhance its margin methodology by introducing a new model to estimate the liquidation cost for all options and futures, as well as the securities in margin collateral. As noted above, closing out positions of a defaulted Clearing Member in the open market could entail selling longs at bid price and covering shorts at ask price. These closing-out costs are currently not taken into account in STANS for all options (with the exception of long-dated SPX index option series, as noted above).[9] Therefore, the purpose of the proposed change is to add additional financial resources in the form of margin, based on liquidation cost grids calibrated using historical stressed periods, to guard against potential shortfalls in margin requirements that may arise due to the costs of liquidating Clearing Member portfolios in the event of a default. The liquidation cost charge would be applied as an add-on to all accounts incurring a STANS margin charge.

The proposed liquidation cost model calculates liquidation cost based on risk measures, gross contract volumes and market bid-ask spreads. In general, the proposed model would be used to calculate two risk-based liquidation costs for a portfolio, Vega[10] liquidation cost (''Vega LC'') and Delta liquidation cost (''Delta LC''), using ''Liquidation Grids.''[11] Options products will incur both Vega and Delta LCs while Delta-one[12] products such as futures contracts, Treasury securities and equity securities, will have only a Delta charge.

The proposed liquidation cost model described herein would include: (1) The decomposition of the defaulter's portfolio into sub-portfolios by underlying security; (2) the creation and calibration of Liquidation Grids used to determine liquidation costs; (3) the calculation of the Vega LC (including a minimum Vega LC charge) for options products; (4) the calculation of Delta LCs for both options and Delta-one products; (5) the calculation of Vega and Delta concentration factors; (6) the calculation of volatility correlations for Vega LCs; (7) the establishment of a STANS margin floor based on the liquidation cost; and (8) conforming changes to OCC's Margin Policy and Stress Testing and Clearing Fund Methodology Description.

The new liquidation cost model would cover the following cleared products in a Clearing Member's portfolio: Options on indices, equities, Exchange Traded Funds (''ETFs'') and futures; FLEX options; future contracts; Treasury securities; and stock loan and collateral securities. The securities not included in STANS margin calculations would not be covered by the new model.

The proposed approach to calculating liquidation costs and the conforming changes to OCC's Margin Policy are described in further detail below.

[5] *See* Securities Exchange Act Release No. 53322 (February 15, 2006), 71 FR 9403 (February 23, 2006) (SR–OCC–2004–20). A detailed description of the STANS methodology is available at *http://optionsclearing.com/risk-management/margins/.*

[6] *See* OCC Rule 601.

[7] STANS margins may also include other add on charges, which are considerably smaller than the base and stress test components, and many of which affect only a minority of accounts.

[8] A liquidation cost model was introduced into STANS in 2012 as part of OCC's OTC clearing initiatives. The model is only applied to long-dated options on the Standard & Poor's (''S&P'') 500 index (''SPX'') that have a tenor of three-years or greater. *See* Securities Exchange Act Release No. 34–70719 (October 18, 2013), 78 FR 63548 (October 24, 2013) (SR–OCC–2013–16). The existing liquidation model for long-dated SPX options would be replaced by this new model. OCC currently does not have any open interest in OTC options. OCC does currently clear similar exchange traded long-dated FLEX SPX options; however, these options make up less than 0.5% of SPX options open interest.

[9] *Id.*

[10] The Delta and Vega of an option represent the sensitivity of the option price with respect to the price and volatility of the underlying security, respectively.

[11] ''Liquidation Grids'' would be comprised collectively of Vega Liquidation Grids, Vega Notional Grids, Delta Liquidation Grids, and Delta Notional Grids. Liquidation Grids are discussed in more detail below in the *Creation and Calibration of Liquidation Grids* section.

[12] ''Delta one products'' refer to products for which a change in the value of the underlying asset results in a change of the same, or nearly the same, proportion in the value of the product.

1. Portfolio Decomposition and Creation of Sub-Portfolios

For a portfolio consisting of many contracts and underlyings, the proposed model would first divide (or decompose) the portfolio into sub-portfolios by underlying security such that all contracts with the same underlying are grouped into the same sub-portfolio. The Vega LC and Delta LC are first calculated at a sub-portfolio level and then aggregated to derive the final liquidation cost for the total portfolio. All the option positions with the same fundamental underlying would form one sub-portfolio because they share the same risk characteristics. The equity index, index future and index ETFs would all be categorized by the underlying index that is the basis for the index, future, and ETF-underlying securities. The corresponding options on the index, index future, and ETFs would therefore fall into the same sub-portfolio. In addition, FLEX options on the same underlying would be included in the same sub-portfolio of the regular options. Similarly, cash products such as equities and futures would be grouped in the same sub-category based on their underlying symbols. All Treasury security positions would form one sub-portfolio. The calculation of Vega LC and Delta LC for each sub-portfolio is summarized in the next sections.

2. Creation and Calibration of Liquidation Grids

A key element of the proposed liquidation cost model is the ''Liquidation Grids.'' The calculations of Vega LC and Delta LC involve a number of liquidity-related quantities such as volatility bid-ask spreads, price bid-ask spreads, Vega notional, and Delta notional. The collection of these quantities would be used to create the following Liquidation Grids.

1. *Vega Liquidation Grids (or volatility grids):* The Vega Liquidation Grids would represent the level of bid-ask spreads on the implied volatility of option contracts for a given underlying. Since the volatility spreads of option contracts vary by the Delta and tenor of the option, OCC would divide the contracts into several Delta buckets by tenor buckets.[13] Each pair (Delta, tenor) is referred to as a Vega bucket. For each bucket, an average volatility spread is estimated and defined as the volatility grid for the bucket. The size of grid would essentially represent the cost for liquidating one unit of Vega risk in the bucket.

2. *Vega Notional Grid:* The Vega Notional Grid of an underlying security would be the average trading options volume weighted by the Vega of all options on the given underlying. The size of Vega Notional grids would indicate the average daily trading volume in terms of dollar Vegas (*i.e.,* the Vega multiplied by the volume of the option).

3. *Delta Liquidation Grid:* The Delta liquidation grid would represent an estimated bid-ask price spread (in percentage) on the underlying.[14] It represents the cost of liquidating one dollar unit of the underlying security. The Delta liquidation grid for Treasury securities represents bid-ask yield spreads, expressed in basis points.

4. *Delta Notional Grid:* The Delta Notional grid of an underlying security would represent the average trading volume in dollars of the security.[15]

Vega Notional Grids are calibrated at the security level; that is, each individual underlying security would have its own Vega Notional. The Delta Notional Grid and both Vega and Delta Liquidation Grids for all underlying securities are estimated at the levels of a fixed number of classes based on their liquidity level.[16] All equity securities would be divided, based on their membership in commonly used market indices (including, but not limited to, the S&P 100 and 500 index) or other market liquidity measurements, into liquidity classes (which may include, but are not limited to, High Liquid Equities, Medium Liquid Equities and Low Liquid Equities). Any new equity security would generally default to the lowest liquidity classification unless otherwise assigned to a higher liquidity classification when deemed necessary. Major indices (*e.g.,* SPX or the Cboe Volatility Index (''VIX'')) may form their own index liquidity class, which may cover indices, index ETFs, and index futures. In addition, sector ETFs, ETFs on a major commodity (such as Gold, Crude/Natural Gas, Metals, and Electricity), and Treasury ETFs would generally each form individual classes of their own, subject to the availability of liquidation data. Pursuant to the proposed Margins Methodology, these liquidity classes would be reviewed annually or at a frequency determined by OCC's MRWG and updated as needed, taking into consideration such factors including, but not limited to, changes in membership of the S&P 100 index and S&P 500 index, listing and delisting of securities, and any corporate actions on the existing securities.

Because the bid-ask spreads can change daily, the use of spreads from current market conditions could cause liquidation costs to fluctuate dramatically with market volatility, especially during a stressed market period. To mitigate this procyclicality issue, Liquidation Grids would be calibrated from several historical stressed periods, which are selected based on the history of VIX index levels and would remain unchanged with time until a new stressed period is selected and added to the calibrations in accordance with the requirements of the proposed Margins Methodology.[17]

3. Vega Liquidation Cost

Vega Liquidation Cost Calculation

Vega LC is the main component of the proposed liquidation cost model. For a simple option contract, the Vega LC would be its position Vega multiplied by its respective bucket in the Vega Liquidation Grid. The result is approximately equal to one half of the bid-ask price spread. For a portfolio consisting of many contracts and underlyings, the model first divides the portfolio into sub-portfolios by underlying security such that all contracts with the same underlying are grouped into the same sub-portfolio (as described above). The Vega LCs for sub-portfolios are calculated first and then aggregated to derive the Vega LC for the total portfolio.

[13] Initially, Vega Liquidation Grids would consist of 5 Delta buckets by 5 tenor buckets, with a total of 25 pairs; however, the Vega Liquidation Grids would be reviewed annually or at a frequency determined by OCC's Model Risk Working Group (''MRWG'') and updated as needed as determined by the MRWG. The MRWG is responsible for assisting OCC's Management Committee in overseeing and governing OCC's model-related risk issues and includes representatives from OCC's Financial Risk Management department, Quantitative Risk Management department, Model Validation Group, and Enterprise Risk Management department.

[14] Delta Liquidation Grids are comprised of several rows representing liquidity categories for the underlying security (initially 14 rows, subject to periodic review and modification) and one column representing the cost of liquidating one dollar unit of the underlying security. The Delta Liquidation Grids would be reviewed annually or at a frequency determined by OCC's MRWG and updated as needed as determined by the MRWG.

[15] Delta Notional Grids are comprised of several rows representing liquidity categories for the underlying security (initially 14 rows, subject to periodic review and modification) and one column representing the average trading volume in dollars of the underlying security. The Delta Notional Grids would be reviewed annually or at a frequency determined by OCC's MRWG and updated as needed as determined by the MRWG.

[16] Within the same liquidity group, the Vega Notional can vary dramatically from name to name. Moreover, Vega risk can be much greater than Delta risk. As a result, OCC would calculate Vega Notionals at the security level as opposed to the liquidity level.

[17] The Liquidation Grids will be reviewed annually or at a frequency determined by the MRWG.

The Vega LC for a sub-portfolio, which consists of all the contracts with the same underlying security, would be calculated in several steps. First, the Liquidation Grids would be calibrated for Vega ''buckets'' that consist of Delta bins by tenor bins as discussed above. These Vega buckets are used to represent the volatility risk at the different areas on the implied volatility surface. Next, the Vega of each contract position in a given sub-portfolio would be calculated and bucketed into one of the Vega buckets. The Vegas falling into the same Vega bucket would then be netted. The Vega LC for each of the Vega buckets is calculated as the net Vega multiplied by the Vega grid of the buckets. Finally, the total liquidation cost for the sub-portfolio would be aggregated from these bucket Vega LCs by using correlations between the Vega buckets. Since the sub-portfolios are formed by the fundamental equity or index underlying the option, the Vega LCs of closely related but different underlying securities are allowed to net. For example, Vega LCs for SPX and related indices, futures, and ETFs that are based on the S&P 500 index would be allowed 100% netting.

The Vega LC for the total portfolio would be a similar correlation-based sum of Vega LCs of all the sub-portfolios, taking into account correlations between the products' implied volatility.[18]

Minimum Liquidation Cost

Because the proposed model allows risk netting across closely related option contracts, it is possible that a well-hedged option strategy could result in a very small or zero liquidation cost. To prevent this from happening, a minimum liquidation cost would be introduced to the Vega liquidation charges. The minimum liquidation cost for a sub-portfolio would be calculated as the gross number of option contracts multiplied by a minimum cost per contract value.[19] The minimum cost amount would be calculated for the entire portfolio and would be used to floor the final total Vega LC. The proposal would not apply a minimum cost for Delta LC due to the immaterial impact a minimum Delta LC would have on the overall liquidation cost charge.

4. Delta Liquidation Cost

In addition to Vega risk, the model also considers the Delta risk presented in an entire portfolio. If a portfolio has positions in either options, futures, equities, or Treasury securities, it will contain some Delta risk. Under the proposed model, the liquidation cost due to Delta risk in a sub-portfolio (as defined by the underlying) would be approximated by the net dollar Delta of the sub-portfolio multiplied by its respective bucket in the Delta Liquidation Grid.

The proposed model would allow netting of Delta LC if the option contracts, futures, or equity positions belong to or are related to a top index (such as SPX or VIX). For example, in a portfolio, positions in SPX-related options, options on futures, futures, or collateral have their Delta LC netted.

Under the proposed model, U.S. dollar Treasury bonds would form one sub-portfolio. The Delta or DV01 (*i.e.,* dollar value of one basis point) of all the bonds would be calculated and bucketed into six tenor buckets. For each bucket, the liquidation cost would be approximated by the absolute value of the net DV01 of the bucket multiplied by the Liquidation Grid (in basis points) in the corresponding tenor bucket. The total liquidation cost for the Treasury security sub-portfolio would then be a sum of the costs over all the buckets.

The Delta LC for the total portfolio would be simple sum of the Delta LCs over all sub-portfolios.

5. Concentration Charges

In addition to Vega and Delta LCs, the proposed model also would incorporate the potential risks involved in closing out large or concentrated positions in a portfolio. The ''largeness'' of an option position is typically measured in terms of Average Daily Volume (''ADV''). The Vega volume or notional, defined as ''Vega-weighted ADV,'' is also a relevant measure of options trading volume. Closing out large or concentrated positions with one or more Vega notional may either take longer to liquidate or demand wider spreads, and therefore could incur additional cost. To cover this additional risk, the proposed model would use Vega concentration factors (''Vega CF'') to scale the Vega LC for option positions. The Vega CFs would be equal to one for small positions that are less than one Vega notional, but may be scaled up for large positions as a function of the size of the positions. Similar to Vega CF, Delta concentration factors (''Delta CF'') would be used to scale the Delta LC to account for the concentration risk associated with large Delta positions.

6. Volatility Correlations

Under the proposed model, the Vega LC for each underlying sub-portfolio is calculated using correlations between the Vega buckets. The correlation matrix from the most liquid product (SPX) would be used as the base and would be scaled for other underlyings based on their liquidity class. These would be calibrated from time periods that overlap the stress periods used to calculate Liquidation Grids.

To aggregate the liquidation cost at the portfolio level, the pair-wise correlations of implied volatilities between different underlyings are needed. OCC would use a single correlation value for all cross-underlying correlations rather than a correlation matrix for all cross-underlying correlations to simplify the calibration of the grids. To account for potential errors that may arise from using a single correlation value, OCC would calculate three single correlations representing the minimum, average, and maximum correlation across the liquidity class to determine three different Vega LCs. The highest of these three Vega LCs would be used as the final Vega LC.

7. STANS Margin Floor

The proposed liquidation costs would be added to the base and stress margin components of STANS that are intended to cover the potential losses due to price movements over a two-day risk horizon. In certain cases, well-hedged portfolios may not experience any loss and the resultant STANS margin requirement is close to zero or may even become positive in some extreme cases. If the STANS requirement is positive, this may result in a credit instead of a charge for the Clearing Member. To account for the risk of potentially liquidating a portfolio at current (instead of two-day ahead) prices, no credit from the margin would be allowed so that the final margin requirement would not be lower than the amount of the liquidation cost.

8. Margin Policy and Stress Testing and Clearing Fund Methodology Description

OCC also would make conforming changes to its Margin Policy and Stress Testing and Clearing Fund Methodology Description to reflect the inclusion of the new liquidation cost charge as an add-on charge to the base STANS margin and how the liquidation cost

[18] *See infra, Volatility Correlations* section.

[19] The minimum cost rate would initially be set as $2 per contract, unless the position is long and the net asset value per contract is less than $2. (For a typical option with a contract size of 100, this would occur if the option was priced below 0.02.) This value would be reviewed annually or at a frequency determined by OCC's MRWG and recalibrated as needed over time.

charge add-on would be incorporated in Clearing Fund shortfall calculations.[20]

Clearing Member Outreach

To inform Clearing Members of the proposed change, OCC has provided overviews of its proposed liquidation cost model to the Financial Risk Advisory Council (''FRAC''), a working group comprised of exchanges, Clearing Members and indirect participants of OCC, and the OCC Roundtable, which was established to bring Clearing Members, exchanges and OCC together to discuss industry and operational issues,[21] during 2016 and 2017. OCC has also published Information Memos to all Clearing Members discussing the proposed change.

Under the proposed liquidation cost model, each Clearing Member/account would independently observe different levels of impact based on the composition of their cleared portfolios. Based on OCC's analysis to-date, directional portfolios containing more outright positions, which are more typically associated with customer accounts, are most likely to see the largest impact from the proposed liquidation cost charges, while more well-hedged portfolios, such as market maker accounts, would be less impacted (and are more likely to incur the minimum liquidation cost charge). In the aggregate, OCC expects the proposed liquidation cost charges to make up approximately 5–8% of total risk margin charges, with customer accounts accounting for roughly 60% of the proposed liquidation cost charges, and proprietary accounts and market markers generating approximately 25% and 15% of the proposed liquidation cost charges, respectively.

Given the magnitude of expected changes in margins, OCC expects to conduct an extended parallel implementation for Clearing Members prior to implementation. Additionally, OCC will perform additional outreach to the FRAC upon submission of its regulatory filings to remind Clearing Members of the pending changes and direct outreach with those Clearing Members that would be most impacted by the proposed change and would work closely with such Clearing Members to coordinate the implementation and associated funding for such Clearing Members resulting from the proposed change.[22]

Implementation Timeframe

OCC expects to implement the proposed changes no sooner than thirty (30) days and no later than one hundred eighty (180) days from the date that OCC receives all necessary regulatory approvals for the filings. OCC will announce the implementation date of the proposed change by an Information Memo posted to its public website at least two (2) weeks prior to implementation.

Expected Effect on and Management of Risk

OCC believes that the proposed change, which would introduce a new liquidation cost model into OCC's margin methodology, would reduce the overall level of risk to OCC, its Clearing Members, and the markets served by OCC. As described above, STANS margin requirements are comprised of the sum of several components, each reflecting a different aspect of risk. These margins are intended to cover the potential losses due to price movements over a two-day risk horizon; however, the base and stress margin components do not cover the potential liquidation cost OCC may incur in closing out a defaulted Clearing Member's portfolio. Closing out positions in a defaulted portfolio could entail selling longs at bid price and covering shorts at ask price. This means that additional liquidation costs may need to take into account the bid-ask price spreads. The proposed liquidation cost model would calculate liquidation costs for OCC's cleared products based on risk measures, gross contract volumes and market bid-ask spreads. The proposed model is designed to provide additional financial resources in the form of margin, based on liquidation costs and current market prices, to guard against potential shortfalls in margin requirements that may arise due to the costs of liquidating Clearing Member portfolios. OCC uses the margin it collects from a defaulting Clearing Member to protect other Clearing Members from losses they cannot anticipate or control as a result of such a default. As a result, OCC believes the proposed changes would reduce the overall level of risk to OCC, its Clearing Members, and the markets served by OCC.

Consistency With the Payment, Clearing and Settlement Supervision Act

The stated purpose of the Clearing Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[23] Section 805(a)(2) of the Clearing Supervision Act[24] also authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like OCC, for which the Commission is the supervisory agency. Section 805(b) of the Clearing Supervision Act[25] states that the objectives and principles for risk management standards prescribed under Section 805(a) shall be to:

- Promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

OCC believes that the proposed changes described herein would enhance its margin methodology in a manner consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act[26] and the risk management standards adopted by the Commission in Rule 17Ad–22 under the Act for the reasons set forth below.[27]

OCC believes the proposed changes are consistent with the objectives and principles of Section 805(b) of the Clearing Supervision Act.[28] As described above, STANS margin requirements are comprised of the sum of several components, each reflecting a different aspect of risk. These margins are intended to cover the potential

[20] The Stress Testing and Clearing Fund Methodology Description would be revised to note that the shortfall of a portfolio is calculated by offsetting its profit and loss (''PnL'') in a stress scenario with its STANS margin assets, which include base margin (*i.e.,* 99% Expected Shortfall), excess net asset value related to long option premium, any non-collateral-in-margins haircut amounts, and various other Add-On Charges such as the proposed liquidation cost charges. Since the cost of liquidation is not considered in stress scenario PnL, a charge for liquidation costs using the same values as calculated for margins is included in shortfall calculations to ensure that the liquidation cost charge is part of the required total credit financial resources.

[21] The OCC Roundtable is comprised of representatives of the senior OCC staff, participant exchanges and Clearing Members, representing the diversity of OCC's membership in industry segments, OCC-cleared volume, business type, operational structure and geography.

[22] Specifically, OCC will discuss with those Clearing Members how they plan to satisfy any increase in their margin requirements associated with the proposed change.

[23] 12 U.S.C. 5461(b).

[24] 12 U.S.C. 5464(a)(2).

[25] 12 U.S.C. 5464(b).

[26] *Id.*

[27] 17 CFR 240.17Ad–22. *See* Securities Exchange Act Release Nos. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11) (''Clearing Agency Standards''); 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (''Standards for Covered Clearing Agencies''). OCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and therefore must comply with the requirements of Rule 17Ad–22(e).

[28] 12 U.S.C. 5464(b).

losses due to price movements over a two-day risk horizon; however, the base and stress margin components do not cover the potential liquidation cost OCC could incur in closing out a defaulted Clearing Member's portfolio. Closing out positions in a defaulted portfolio could entail selling longs at bid price and covering shorts at ask price. This means that additional liquidation costs may need to take into account the bid-ask price spreads. The proposed model is designed to provide additional financial resources in the form of margin to guard against potential shortfalls in margin requirements that may arise due to the costs of liquidating Clearing Member portfolios. OCC uses the margin it collects from a defaulting Clearing Member to protect other Clearing Members from losses as a result of the default. As a result, OCC believes the proposed change would promote robust risk management and safety and soundness while reducing systemic risks and would thereby support the stability of the broader financial system.

Rule 17Ad–22(b)(2) [29] requires, in part, that a registered clearing agency that performs central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements. As described above, the proposed liquidation cost model is a risk-based model that calculates liquidation cost based on risk measures, gross contract volumes, and market bid-ask spreads. The proposed model is designed to provide additional financial resources in the form of margin, based on liquidation costs and current market prices, to guard against potential shortfalls in margin requirements that may arise due to the costs of liquidating Clearing Member portfolios, which currently are not taken into account in STANS for all of OCC's cleared products. Accordingly, the proposed risk-based model would be used to calculate margin requirements designed to limit OCC's credit exposures to participants under normal market conditions in a manner consistent with Rule 17Ad–22(b)(2).[30]

Rule 17Ad–22(e)(6)(i) [31] further requires a covered clearing agency that provides central counterparty services to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. The proposed liquidation cost model is a risk-based model that would calculate additional margin charges designed to account for potential shortfalls in margin requirements that may arise due to the costs of liquidating Clearing Member portfolios by taking into consideration the risks and attributes associated with relevant products and portfolios cleared by OCC (*e.g.,* volatility bid-ask spreads, price bid-ask spreads, Vega notional, and Delta notional). Accordingly, OCC believes the proposed changes are consistent with Rule 17Ad–22(e)(6)(i).[32]

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date the proposed change was filed with the Commission or (ii) the date any additional information requested by the Commission is received. OCC shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

OCC shall post notice on its website of proposed changes that are implemented. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the advance notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–OCC–2019–802 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–OCC–2019–802. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the advance notice that are filed with the Commission, and all written communications relating to the advance notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–OCC–2019–802 and should be submitted on or before June 5, 2019.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10522 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[29] 17 CFR 240.17Ad–22(b)(2).

[30] *Id.*

[31] 17 CFR 240.17Ad–22(e)(6)(i).

[32] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85870; File No. SR–OCC–2019–801]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Related to The Options Clearing Corporation's Margin Methodology for Volatility Index Futures

May 15, 2019.

I. Introduction

On March 18, 2019, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–OCC–2019–801 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') [3] to propose changes to OCC's margin methodology for futures on indexes designed to measure volatilities implied by prices of options on a particular underlying interest.[4]

The Advance Notice was published for public comment in the **Federal Register** on April 23, 2019,[5] and the Commission has not received comments regarding the proposal contained in the Advance Notice.[6] This publication serves as notice of no objection to the Advance Notice.

II. Background

The System for Theoretical Analysis and Numerical Simulations (''STANS'') is OCC's methodology for calculating Clearing Member margin requirements. STANS includes econometric models to forecast price and volatility movements in determining Clearing Member margin requirements, which are calculated at the portfolio level of Clearing Member accounts with positions in marginable securities.[7] The STANS methodology measures the exposure of portfolios containing options, futures, and cash instruments.

Certain indices are designed to measure the volatility implied by the prices of options on a particular reference index or asset (''Volatility Indexes'').[8] OCC clears futures contracts on Volatility Indexes (''Volatility Index Futures'').[9] Currently, OCC models the future settlement prices of Volatility Index Futures in STANS based on the index underlying the futures contract. In this modeling process, OCC assumes that the values of the underlying index follow a long-term stable process, notwithstanding any short-term fluctuations. On a daily basis, OCC recalibrates the distribution that defines this process so that the expected final settlement prices of the Volatility Index Futures match the then currently-observed market prices.

OCC's current methodology for modeling future settlement prices of Volatility Index Futures is subject to certain limitations because the model is based on the Volatility Indexes underlying the relevant futures contracts. First, Volatility Indexes cannot be invested in and, therefore, cannot be replicated by static portfolios of traded contracts. Second, the term structure of the futures market cannot be modeled using just the underlying Volatility Indexes.[10] Finally, because of the term structure of the futures market, futures on a volatility index are less volatile and may have a lower probability of extreme price movements than the underlying index itself. Additionally, due to the limitations of modeling the term structure, the current model may under-margin positions in certain strategies that Clearing Members may deploy that involve spreads between delivery dates.

The Advance Notice includes changes that OCC believes would address the limitations described above. The construction of and reliance on ''synthetic'' futures is essential to the changes that OCC proposes.[11] According to OCC, its current model was developed before sufficient data on Volatility Index Futures was available for the construction of synthetic futures.[12] OCC also represented that, in recent years, it has seen significant growth in trading volume for Volatility Index Futures.[13] As described in more detail below, OCC proposes to: (1) Estimate future settlement prices based on synthetic futures rather than the Volatility Indexes underlying Volatility Index Futures; (2) modify the statistical distribution that OCC uses to model price returns of the synthetic futures; and (3) introduce an anti-procyclical floor to reduce the potential for sudden increases in margin requirements that could result from corrections in abnormally low levels of volatility.

(1) Daily Re-Estimation of Prices Using ''Synthetic'' Futures

OCC proposes to modify the way it estimates future settlement prices for Volatility Index Futures. OCC currently models future settlement prices based

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[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Notice of Filing *infra* note 5, at 84 FR 16915.

[5] Securities Exchange Act Release No. 85670 (April 17, 2019), 84 FR 16915 (April 23, 2019) (SR–OCC–2019–801) (''Notice of Filing''). On March 18, 2019, OCC also filed a related proposed rule change (SR–OCC–2019–002) with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder, seeking approval of changes to its rules necessary to implement the Advance Notice (''Proposed Rule Change''). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. The Proposed Rule Change was published in the **Federal Register** on April 3, 2019. Securities Exchange Act Release No. 85440 (Mar. 28, 2019), 84 FR 13082 (Apr. 3, 2019) (SR–OCC–2019–002).

[6] Since the proposal contained in the Advance Notice was also filed as a proposed rule change, all public comments received on the proposal are considered regardless of whether the comments are submitted on the proposed rule change or the Advance Notice.

[7] *See* Notice of Filing, 84 FR at 16915.

[8] For example, the Cboe Volatility Index (''VIX'') is designed to measure the 30-day expected volatility of the Standard & Poor's 500 index (''SPX''). Generally speaking, the implied volatility of an option is a measure of the expected future volatility of the value of the option's annualized standard deviation of the price of the underlying security, index, or future at exercise, which is reflected in the current option premium in the market. Using the Black-Scholes options pricing model, the implied volatility is the standard deviation of the underlying asset price necessary to arrive at the market price of an option of a given strike, time to maturity, underlying asset price and the current risk-free rate. In effect, the implied volatility is responsible for that portion of the premium that cannot be explained by the then-current intrinsic value (*i.e.,* the difference between the price of the underlying and the exercise price of the option) of the option, discounted to reflect its time value. *See* Notice, 84 FR at 16916, n. 10.

[9] A designated clearing agency, such as OCC, is required to provide advance notice to the Commission of any proposed change to its rules, procedures, or operations that could materially affect the nature or level of risks presented by such designated clearing agency. 12 U.S.C. 5465(e)(1); *see also* 17 CFR 204.19b–4(n)(1)(i). Further, Rule 19b–4(n) states that such changes may include changes that materially affect, among other things, risk management or financial resources. 17 CFR 204.19b–4(n)(2)(ii). The Advance Notice relates to Volatility Index Futures, such as futures on the VIX or VIX-like indices. Such futures, and options on those futures, comprise a material portion of the contracts that OCC clears and settles, and, as such, account for a material portion of the risk that OCC manages. The Advance Notice concerns changes to the way OCC risk manages exposures based on Volatility Index Futures and the financial resources available to OCC to manage the default of a Clearing Member engaged in trading Volatility Index Futures.

[10] Similar to a stock index (*e.g.,* SPX), a Volatility Index does not have an expiration. By contrast, there may be a variety of futures contracts with varying expiry dates on any one Volatility Index. For example, the VIX does not have an expiration date, but market participants may trade VIX futures that expire on different dates.

[11] A ''synthetic'' futures time series refers to a uniform substitute for a time series of daily settlement prices for actual futures contracts. Such a time series would be based on the historical returns of futures contracts with approximately the same tenor.

[12] *See* Notice, 84 FR at 16916.

[13] *See id.*

on the index underlying the futures contract. OCC proposes to model the distribution of future settlement prices based on synthetic futures. Such synthetic futures would be based on the historical returns of futures contracts with approximately the same tenor. For any one underlying interest, there may be a variety of futures contracts with varying expiry dates. As a result of this variety of contracts and maturities, there is no single, continuous times series for the various futures that reference a given underlying interest. Synthetic futures, however, can be used to generate a continuous time series of prices for each futures contract across multiple expirations.

OCC proposes to use the price return histories of synthetic futures in its daily price simulation process alongside the underlying interests of OCC's other cleared and cross-margin products and collateral. OCC believes that the use of synthetic futures would allow OCC's margin system to better approximate correlations between futures contracts of different tenors by creating more price data points and margin offsets.

OCC proposes to update the historical synthetic time series for Volatility Indexes daily. OCC would then map this time series to the corresponding futures contracts. Following the expiration date of the front contract (*i.e.,* the futures contract with the earliest expiration date), each contract within a time series would be replaced with a contract maturing one month later. While synthetic time series contain returns from different contracts, a return on any given date would be constructed from prices of a single contract. OCC would estimate the distribution parameters for synthetic time series daily using recent historical observations. OCC believes that daily re-estimation of prices using synthetic futures instead of the current process, which is based solely on the underlying Volatility Indexes, would allow OCC's model for Volatility Index Futures to more accurately reflect current market conditions and achieve better margin coverage across the term curve.[14] Thus, OCC believes the proposed changes would result in margin requirements that respond more appropriately to changes in market volatility and therefore are more accurate for Clearing Members.[15]

(2) Statistical Distribution for Modeling Price Returns

OCC proposes to modify the statistical distribution it uses to model price returns of synthetic futures. The model that OCC currently uses for modeling price returns across its margin system, including for Volatility Index Futures, assumes a symmetric distribution of returns. OCC believes, however, that an asymmetric distribution would better fit the historical data underlying synthetic futures.[16] OCC also believes that employing an asymmetric distribution for modeling price returns of synthetic futures would provide a more consistent framework for treatment of returns on both the upside and downside of the distribution.[17]

(3) Anti-Procyclical Floor

OCC proposes to introduce a new floor for variance estimates of the Volatility Index Futures. OCC would calculate this variance floor based on the Volatility Indexes underlying the Volatility Index Futures. As noted above, OCC assumes that the values of the underlying index follow a long-term stable process, notwithstanding any short-term fluctuations. OCC anticipates that such a floor would prevent sudden increases in margin requirements that would otherwise result from the normalization of volatility from abnormally low levels.[18]

III. Discussion and Commission Findings

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the stated purpose of the Clearing Supervision Act is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities (''SIFMUs'') and strengthening the liquidity of SIFMUs.[19]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe regulations containing risk management standards for the payment, clearing, and settlement activities of designated clearing entities engaged in designated activities for which the Commission is the supervisory agency.[20] Section 805(b) of the Clearing Supervision Act provides the following objectives and principles for the Commission's risk management standards prescribed under Section 805(a):[21]

- Promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

Section 805(c) provides, in addition, that the Commission's risk-management standards may address such areas as risk-management and default policies and procedures, among other areas.[22]

The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act and Section 17A of the Exchange Act (the ''Clearing Agency Rules'').[23] The Clearing Agency Rules require, among other things, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for its operations and risk-management practices on an ongoing basis.[24] As such, it is appropriate for the Commission to review advance notices against the Clearing Agency Rules and the objectives and principles of these risk management standards as described in Section 805(b) of the Clearing Supervision Act. As discussed below, the Commission believes the proposal in the Advance Notice is consistent with the objectives and principles described in Section 805(b) of the Clearing Supervision Act,[25] and in the Clearing Agency Rules, in particular Rule 17Ad–22(e)(6)(i).[26]

A. Consistency With Section 805(b) of the Clearing Supervision Act

The Commission believes that the Advance Notice is consistent with the stated objectives and principles of Section 805(b) of the Clearing Supervision Act. OCC manages its credit exposure to Clearing Members, in part, through the collection of collateral based on OCC's margin methodology. As noted above, OCC's current process for setting margin requirements to collateralize risks posed by Volatility Index Futures is limited because the model is based on the Volatility Indexes underlying the relevant futures contracts. These limitations relate, in part, to the term structure of the futures market, which is not an attribute of the

[14] *See* Notice, 84 FR at 16917.

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See* Notice, 84 FR at 16918.

[19] *See* 12 U.S.C. 5461(b).

[20] 12 U.S.C. 5464(a)(2).

[21] 12 U.S.C. 5464(b).

[22] 12 U.S.C. 5464(c).

[23] 17 CFR 240.17Ad–22. *See* Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11). *See also* Securities Exchange Act Release No. 78961 (September 28, 2016), 81 FR 70786 (October 13, 2016) (S7–03–14) (''Covered Clearing Agency Standards''). The Commission established an effective date of December 12, 2016, and a compliance date of April 11, 2017, for the Covered Clearing Agency Standards. OCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5).

[24] 17 CFR 240.17Ad–22(e).

[25] 12 U.S.C. 5464(b).

[26] 17 CFR 240.17Ad–22(e)(6)(i).

underlying Volatility Indexes. By contrast, synthetic futures, like those proposed by OCC, can be used to generate a continuous time series of futures contract prices across multiple expirations. Additionally, OCC proposes to modify the statistical distribution that it uses to model price returns of synthetic futures such that the resulting curve would better fit the historical data. Finally, OCC proposes to reduce the potential for sudden margin increases resulting from market corrections of abnormally low volatility levels through the implementation of a floor on variance estimates for Volatility Index Futures. The Commission believes that OCC's proposal to use synthetic futures to model Volatility Index Futures contracts, taken together with modification of the relevant statistical distribution and inclusion of a variance floor, is consistent with the promotion of robust risk management because it is designed to address a known limitation of OCC's current models—namely an inability to account for the term structure of Volatility Index Futures—and produce margin requirements that respond more appropriately to market volatility.

Similarly, these changes are consistent with the promotion of safety and soundness and the reduction of systemic risk because they are designed to increase the accuracy of OCC's margin requirements while avoiding sudden shocks to OCC's Clearing Members. Finally, the inclusion of a variance floor designed to reduce the likelihood of sudden margin increases resulting from expected corrections in market volatility is consistent with supporting the stability of the broader financial system.

Accordingly, and for the reasons stated, the Commission believes the changes proposed in the Advance Notice are consistent with Section 805(b) of the Clearing Supervision Act.[27]

B. Consistency With Rule 17Ad–22(e)(6)(i) Under the Exchange Act

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover, if the covered clearing agency provides central counterparty services, its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[28]

OCC proposes to base its estimation of final settlement prices for Volatility Index Futures on synthetic futures rather than the Volatility Indexes underlying Volatility Index Futures. As described above, a margin process based on synthetic futures, as opposed to an underlying index, could more accurately model future price movements for Volatility Index Futures because the synthetic futures can be used to generate a continuous time series of futures contract prices across multiple expirations, while the underlying index alone is insufficient to model the term structure of the futures market. OCC further proposes to adjust the econometric model that it would use to estimate final settlement prices by applying a distribution that better fits observable data of the Volatility Index Futures. Finally, OCC's proposal includes a variance estimate floor to avoid sudden margin increases where the immediate volatility of the Volatility Index Futures deviates significantly from the long-run volatility of the underlying index. The Commission believes, therefore, that OCC's proposal is designed to better account for the term structure of futures contracts, align margin requirements with observable data, and incorporate historical volatility data, thereby producing margin levels commensurate with the particular attributes of Volatility Index Futures. Further, the Commission believes the proposed changes could result in margin requirements that respond more appropriately to changes in market volatility.

Accordingly, based on the foregoing, the Commission believes that the proposed change to OCC's margin methodology for Volatility Index Futures is consistent with Exchange Act Rule 17Ad–22(e)(6)(i).[29]

IV. Conclusion

It is therefore noticed, pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission *does not object* to the Advance Notice (SR–OCC–2019–801) and that OCC is *authorized* to implement the proposed change as of the date of this notice or the date of an order by the Commission approving proposed rule change SR–OCC–2019–002, whichever is later.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10523 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[27] 12 U.S.C. 5464(b).

[28] 17 CFR 240.17Ad–22(e)(6)(i).

[29] *Id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85865; File No. SR–MIAX–2019–24]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 7, 2019, Miami International Securities Exchange, LLC (''MIAX Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, to allow for $1 strike prices above $200 on additional series of options of certain exchange-traded fund (''ETF'') shares.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/* at MIAX Options' principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, to allow for the interval between strike prices of series of options on ETF shares of the PowerShares QQQ Trust (''QQQ'') and iShares Russell 2000 ETF (''IWM'') to be $1 or greater where the strike price is greater than $200.

Currently, Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, allows for the interval between strike prices of series of options on ETF shares of SPDR S&P 500 ETF (''SPY''), iShares S&P 500 Index ETF (''IVV''), and SPDR Dow Jones Industrial Average ETF (''DIA'') to be $1 or greater where the strike price is greater than $200.[5] Under Exchange Rule 404(g), the interval between strike prices of series of options on ETF shares approved for options trading[6] shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on the Exchange.[7] The Exchange generally sets the interval between strike prices of series of options on ETF shares at $5 or greater where the strike price is greater than $200, in accordance with such intervals that have been established on other options exchanges and Exchange Rule 404(g).[8] Specifically, the Exchange proposes to modify the interval setting regime to allow for $1 strike price intervals where the strike price is above $200 for IWM and QQQ options. The Exchange believes that the proposed rule change would make QQQ and IWM options easier for investors and traders to use and more tailored to their investment needs.

Options on QQQ and IWM are designed to provide investors different ways to efficiently gain exposure to the equity markets and execute risk management, hedging, asset allocation and income generation strategies. The QQQ is an investment trust designed to closely track the price and performance of the Nasdaq-100 Index (''NDX''), which represents the largest and most active non-financial domestic and international issues listed on The Nasdaq Stock Market based on market capitalization. Likewise, the IWM is an index ETF designed to closely track the price and performance of the Russell 2000 Index (''RUT''), which represents the small capitalization sector of the U.S. equity market. In general, QQQ and IWM options provide investors with the benefit of trading broader markets in a manageably sized contract.

The value of QQQ is designed to approximate 1/40 the value of the underlying NDX. For example, if the NDX price level is 1400, QQQ strike prices generally would be expected to be priced around $35. The value of IWM is designed to approximate 1/10 the value of the underlying RUT. In the past year, the NDX has climbed above a price level of 7500, and the RUT climbed to a price level of approximately 1700 (both prior to the December 2018 market-wide decline). As the value of the underlying ETF (and the index the ETF tracks) and resulting strike prices for each option continues to appreciate, market participants have requested the listing of additional strike prices ($1 increments) in QQQ and IWM options above $200. The QQQ is among the most actively traded ETFs on the market. It is widely quoted as an indicator of technology stock prices and investor confidence in the technology and telecommunication market spaces, a significant indicator of overall economic health. Similarly, IWM is among the most actively traded ETFs on the market and provides investors with an investment tool to gain exposure to small U.S. public companies. Industry-wide trade volume in QQQ more than doubled from 2017 to 2018. As a result, QQQ options and IWM options have grown to become two of the largest options contracts in terms of trading volume. Investors use these products to diversify their portfolios and benefit from market trends.

Accordingly, the Exchange believes that offering a wider base of QQQ and IWM options affords traders and investors important hedging and trading opportunities, particularly in the midst of current price trends. The Exchange believes that not having the proposed $1 strike price intervals above $200 in QQQ and IWM classes significantly constricts investors' hedging and trading possibilities. The Exchange therefore believes that by having smaller strike intervals in QQQ and IWM, investors would have more efficient hedging and trading opportunities due to the lower $1 interval ascension. The proposed $1 intervals above the $200 strike price will result in having at-the-money series based upon the underlying ETFs moving less than 1%. The Exchange believes that the proposed strike setting regime is in line with the slower movements of broad-based indices. Considering the fact that $1 intervals already exist below the $200 price point and that both QQQ and IWM have consistently inclined in price toward the $200 level, the Exchange believes that continuing to maintain the current $200 level (above which intervals increase 500% to $5), may have a negative effect on investing, trading and hedging opportunities, and volume. The Exchange believes that the investing, trading, and hedging opportunities available with QQQ and IWM options far outweighs any potential negative impact of allowing QQQ and IWM options to trade in more finely tailored intervals above the $200 price point.

The proposed strike setting regime would permit strikes to be set to more closely reflect the increasing values in the underlying indices and allow investors and traders to roll open positions from a lower strike to a higher strike in conjunction with the price movements of the underlying ETFs. Under the current rule, where the next higher available series would be $5 away above a $200 strike price, the ability to roll such positions is effectively negated. Accordingly, to move a position from a $200 strike to a $205 strike under the current rule, an investor would need for the underlying product to move 2.5%, and would not be able to execute a roll up until such a large movement occurred. As stated, the NDX and RUT have experienced continued, steady growth. The Exchange believes that with the proposed rule change, the investor would be in a significantly safer position of being able to roll his open options position from a $200 to a $201 strike price, which is only a 0.5% move for the underlying. As a result, the proposed rule change will allow the Exchange to better respond to customer demand for QQQ and IWM strike prices more precisely aligned with the smaller, longer-term incremental increases in respective underlying ETFs. The Exchange believes

[5] *See* Exchange Rule 404, Interpretation and Policy .10.

[6] *See* Exchange Rule 402(i).

[7] *See* Exchange Rule 404(g).

[8] *See id.*

that the proposed rule change, like the other strike price programs currently offered by the Exchange, will benefit investors by providing investors the flexibility to more closely tailor their investment and hedging decisions using QQQ and IWM options. Moreover, by allowing series of QQQ and IWM options to be listed in $1 intervals between strike prices over $200, the proposal will moderately augment the potential total number of options series available on the Exchange. However, the Exchange believes it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this proposed rule change. The Exchange also believes that Members [9] will not have a capacity issue due to the proposed rule change. In addition, the Exchange represents that it does not believe that this expansion will cause fragmentation of liquidity, but rather, believes that finer strike intervals will serve to increase liquidity available as well as price efficiency by providing more trading opportunities for all market participants.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change to Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, will allow investors to more easily use QQQ and IWM options. Moreover, the proposed rule change would allow investors to better trade and hedge positions in QQQ and IWM options where the strike price is greater than $200, and ensure that investors in both options are not at a disadvantage simply because of the strike price.

The Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act, which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and the rules and regulations thereunder, and the rules of the Exchange. The rule change proposal allows the Exchange to respond to customer demand to allow QQQ and IWM options to trade in $1 intervals above a $200 strike price. The Exchange does not believe that the proposed rule would create additional capacity issues or affect market functionality.

As noted above, ETF options trade in wider $5 intervals above a $200 strike price, whereby options at or below a $200 strike price trade in $1 intervals. This creates a situation where contracts on the same option class effectively may not be able to execute certain strategies such as, for example, rolling to a higher strike price, simply because of the $200 strike price above which options intervals increase by 500%. This proposal remedies the situation by establishing an exception to the current ETF interval regime for QQQ and IWM options to allow such options to trade in $1 or greater intervals at all strike prices.

The Exchange believes that the proposed rule change, like other strike price programs currently offered by the Exchange, will benefit investors by giving them increased flexibility to more closely tailor their investment and hedging decisions. Moreover, the proposed rule change is consistent with the change adopted by Cboe Exchange, Inc. (''Cboe'').[12]

With regard to the impact of this proposal on system capacity, the Exchange believes it and OPRA have the necessary systems capacity to handle any potential additional traffic associated with this proposed rule change. The Exchange believes that its members will not have a capacity issue as a result of this proposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposed rule change will result in additional investment options and opportunities to achieve the investment and trading objectives of market participants seeking efficient trading and hedging vehicles, to the benefit of investors, market participants, and the marketplace in general. Specifically, the Exchange believes that QQQ and IWM options investors and traders will significantly benefit from the availability of finer strike price intervals above a $200 price point. In addition, the interval setting regime the Exchange proposes to apply to QQQ and IWM options is currently applied to SPY, IVV, and DIA options, which are similarly popular and widely traded ETF products and track indexes at similarly high price levels. Thus, the proposed strike setting regime for QQQ and IWM options will allow options on the most actively traded ETFs with index levels at corresponding price levels to trade pursuant to the same strike setting regime. This will permit investors to employ similar investment and hedging strategies for each of these options.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [15] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a

[9] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *See* Securities Exchange Act Release No. 85754 (April 30, 2019), 84 FR 19823 (May 6, 2019) (SR–CBOE–2019–015).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that waiver of this requirement will ensure fair competition among the exchanges by allowing the Exchange to set the interval between strike prices of series of options on ETF shares of QQQ and IWM in a manner consistent with another exchange. Further, the Exchange stated that because the proposed rule change is based on the rules of another Self-Regulatory Organization,[17] it does not introduce any new or novel regulatory issues. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2019–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2019–24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2019–24 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10510 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[17] *See supra* note 12.

[18] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85869; File No. SR–CboeBZX–2019–040]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the BZX Equities Fee Schedule To Correct an Inadvertent Drafting Error Introduced in a Previous Rule Filing

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 1, 2019, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (''BZX'' or the ''Exchange'') is filing with the Securities and Exchange Commission (the ''Commission'') a proposed rule change to amend the BZX Equities fee schedule to correct an inadvertent drafting error introduced in a previous rule filing. The text of the proposed rule change is attached as Exhibit 5 (sic).

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the BZX Equities fee schedule to correct an inadvertent drafting error introduced in a previous rule filing that changed the terminology used to describe certain connectivity products offered to Exchange members.

On December 21, 2018, the Exchange filed a proposed rule change to revise the nomenclature associated with logical port fees charged for order entry, which were renamed to ''match capacity fees.'' [3] The purpose of that filing was to properly characterize the fees for order entry logical ports as capacity fees to better reflect the service offering of these products and shed additional light on how firms are charged for connectivity. Although, as represented in the filing, no changes to the Exchange's charges were proposed,[4] the Exchange thought that this was an important step to increase transparency around its connectivity services. Specifically, the Exchange thought that identifying its fees charged for order entry logical ports as capacity fees, and providing associated data and analysis surrounding the use of order entry logical ports would provide valuable information to the Commission and the industry about the services provided by the Exchange to firms that choose to access these services. To reflect this change to the terminology used to describe order entry logical ports in the BZX Equities fee schedule, the Exchange deleted a line item titled ''Logical Ports (excluding Purge Port, Multicast PITCH Spin Server Port or GRP Port),'' and replaced it with a section titled ''Match Capacity Fees,'' subject to the same monthly fee, but unfortunately did not address the remaining logical ports used for other purposes.

The Exchange understands that the deleted language should not have been removed from the fee schedule in order to effect the nomenclature change described in its December filing, as such language was not previously limited to order entry logical ports. As described in a number of prior filings, including the filing to initially introduce this logical port line item in 2009,[5] the deleted language previously applied both to the order entry ports that were explicitly the subject of the December filing, and a handful of other ports that were not addressed in that filing, including drop ports and ports used for the receipt of certain market data feeds. Specifically, the deleted section had applied to Cboe Auction Feed Ports, FIXDROP Ports, Order Drop Ports, Last Sale Ports, PITCH Ports, and TOP Ports.[6] As a result, the new nomenclature inserted for match capacity fees—which was adopted solely with order entry connectivity in mind—does not quite capture all of the other connectivity offerings included under this section.

The Exchange therefore proposes to add language back to this section to properly account for drop and market data ports that have been charged under the same heading as order entry connectivity since 2009. Specifically, the fee schedule would provide that other logical ports (*i.e.,* including Cboe Auction Feed Ports, FIXDROP Ports, Order Drop Ports, Last Sale Ports, PITCH Ports, and TOP Ports) are subject to a monthly fee of $550 per month, thereby ensuring that these fees are identified separately from the match capacity fees charged for order entry. The Exchange believes that this change would increase transparency around its charges by fixing a drafting error introduced when the Exchange renamed its order entry logical port charges.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,[7] in general, and furthers the requirements of Section 6(b)(4),[8] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. Specifically, the Exchange believes that the proposed rule change is reasonable, equitable, and not unfairly discriminatory as it would clarify the fees charged for drop and market data ports. As an unintended result of a drafting error in recent proposed rule change to change the nomenclature associated with order entry connectivity, the BZX Equities fee schedule is missing language that applied to certain other logical ports. The Exchange believes that reinserting language that references these other logical port options would reduce confusion around the Exchange's charges and ensure that these fees are appropriately referenced on the fee schedule. The fees described in the proposed language are the same as the fees identified prior to the inadvertent deletion of this language in the December filing, but the fee schedule would be amended to explicitly list all of the ports charged under this section in the interest of furthering transparency around the Exchange's charges. The Exchange believes that these steps will help ensure that its fee schedule fully and accurately represents the fees charged for market data logical ports, as previously filed with the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change is designed to reduce potential confusion around the Exchange's connectivity charges by reinstating a line item in the Exchange's fee schedule that should not have been deleted when the Exchange changed the nomenclature associated with order entry logical port fees, and adding additional detail to this item that describes the products for which those fees apply. The Exchange believes that this change would increase transparency to the benefit of members and investors without having any significant impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and paragraph (f) of Rule 19b–4 [10] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the

[3] *See* Securities Exchange Act Release No. 84963 (December 26, 2018), 84 FR 830 (January 31, 2019) (SR–CboeBZX–2018–095).

[4] For example, the filing repeatedly referenced changes to ''the nomenclature associated with the current logical port fees'' or ''proposed changes in terminology,'' and did not address any changes related to logical ports used to deliver market data to subscribers.

[5] *See* Securities Exchange Act Release No. 60586 (August 28, 2009), 74 FR 46256 (September 8, 2009) (SR–BATS–2009–026) (Approval Order).

[6] All other logical ports, except for Purge Ports, Multicast PITCH Spin Server, Multicast PITCH GRP Ports, and match capacity allocations are currently offered free of charge.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f).

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2019–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–040. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2019–040, and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10516 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85860; File No. SR–NYSEArca–2019–02]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Relating to the Listing and Trading of the Shares of the ProShares UltraPro 3x Natural Gas ETF and ProShares UltraPro 3x Short Natural Gas ETF Under NYSE Arca Rule 8.200–E

May 15, 2019.

On January 28, 2019, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the ProShares UltraPro 3x Natural Gas ETF and ProShares UltraPro 3x Short Natural Gas ETF under NYSE Arca Rule 8.200–E. The proposed rule change was published for comment in the **Federal Register** on February 15, 2019.[3]

On March 26, 2019, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] The Commission has received no comment letters on the proposal.

The Commission is publishing this order to institute proceedings pursuant to Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.

I. Exchange's Description of the Proposal[7]

The Exchange proposes to list and trade shares (''Shares'') of the ProShares UltraPro 3x Natural Gas ETF and ProShares UltraPro 3x Short Natural Gas ETF (individually ''Fund'' and, collectively, ''Funds'') under NYSE Arca Rule 8.200–E, Commentary .02, which governs the listing and trading of Trust Issued Receipts.[8] Each Fund is a series of the ProShares Trust II (''Trust''), a Delaware statutory trust. [9] The Trust and the Funds are managed and controlled by ProShare Capital Management LLC (''ProShare Capital'' or ''Sponsor''). ProShare Capital is registered as a commodity pool operator with the Commodity Futures Trading Commission and is a member of the National Futures Association.

ProShares UltraPro 3x Natural Gas ETF

The investment objective of this Fund is to seek daily investment results, before fees and expenses, that correspond to three times (3x) the performance of the Bloomberg Natural Gas Subindex℠ (''Benchmark'').[10] This Fund seeks to achieve its investment objective for a single day, not for any other period.[11]

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85088 (Feb. 11, 2019), 84 FR 4573 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 85417 (Mar. 26, 2019), 84 FR 12304 (Apr. 1, 2019). The Commission designated May 16, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] The Commission notes that additional information regarding, among other things, the Shares, Funds, investment objective, permitted investments, investment strategies and methodology, investment restrictions, creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures, can be found in the Notice (*see supra* note 3) and the Registration Statement (*see infra* note 9), as applicable.

[8] Commentary .02 to NYSE Arca Rule 8.200–E applies to Trust Issued Receipts that invest in ''Financial Instruments.'' The term ''Financial Instruments,'' as defined in Commentary .02(b)(4) to NYSE Arca Rule 8.200–E, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

[9] The Trust is registered under the Securities Act of 1933. On May 19, 2017, the Trust filed with the Commission a registration statement on Form S–1 under the Securities Act of 1933 relating to the Funds (File No. 333–218136) (''Registration Statement'').

[10] The Benchmark is intended to reflect the performance of a rolling position in natural gas futures contracts listed on the New York Mercantile Exchange (''NYMEX''), including the impact of rolling, without regard to income earned on cash positions. The Benchmark is a ''rolling index,'' which means that the Index performance includes the impact of closing out futures contracts that are nearing expiration and replacing them with futures contracts with later expirations. This process is commonly referred to as ''rolling.''

[11] The return of a Fund for a period longer than a single trading day is the result of its return for

Continued

ProShares UltraPro 3x Short Natural Gas ETF

The investment objective of this Fund is to seek daily investment results, before fees and expenses, that correspond to three times the inverse (-3x) of the performance of the Benchmark. This Fund seeks to achieve its investment objective for a single day, not for any other period.

Investment Strategies of the Funds

In seeking to achieve the Funds' investment objectives, the Sponsor will utilize a mathematical approach to determine the type, quantity, and mix of investment positions that ProShare Capital believes, in combination, should produce daily returns consistent with the Funds' respective objectives.

Each Fund will seek to meet its respective investment objective by investing, under normal market conditions,[12] in futures contracts traded in the United States and listed options on such contracts (collectively, ''Futures Contracts'').[13] The Funds will not invest directly in natural gas. The Funds' investments in Futures Contracts will be used to produce economically ''leveraged'' or ''inverse leveraged'' investment results for the Funds.

Each Fund also may obtain exposure to the Benchmark through investment in over-the-counter (''OTC'') swap transactions and forward contracts referencing such Benchmark (''Financial Instruments''). For example, a Fund may invest in Financial Instruments in the event position, price or accountability limits are reached with respect to Futures Contracts[14] or exposure limits are reached with a particular futures commission merchant or if the market for a specific futures contract experiences emergencies (*e.g.,* natural disaster, terrorist attack or an act of God) or disruptions (*e.g.,* a trading halt) or in situations where the Sponsor deems it impractical or inadvisable to buy or sell Futures Contracts (such as during periods of market volatility or illiquidity).

Each Fund will also hold cash or cash equivalents, such as U.S. Treasury securities or other high credit quality, short-term fixed-income or similar securities (such as shares of money market funds and collateralized repurchase agreements), pending investment in Futures Contracts or Financial Instruments or as collateral for the Funds' investments.

In addition, to the extent a Fund enters into swap agreements and other over-the-counter transactions, it will do so only with large, established and well capitalized financial institutions that meet the Sponsor's credit quality standards and monitoring policies. Each Fund will use various techniques to minimize credit risk including early termination or reset and payment, using different counterparties and limiting the net amount due from any individual counterparty.

The Funds do not intend to hold Futures Contracts through expiration, but instead intend to ''roll'' or close their respective positions before expiration. When the market for these contracts is such that the prices are higher in the more distant delivery months than in the nearer delivery months, the sale during the course of the ''rolling process'' of the more nearby contract would take place at a price that is lower than the price of the more distant contract. This pattern of higher futures prices for longer expiration Futures Contracts is referred to as ''contango.'' Alternatively, when the market for these contracts is such that the prices are higher in the nearer months than in the more distant months, the sale during the course of the ''rolling process'' of the more nearby contract would take place at a price that is higher than the price of the more distant contract. This pattern of higher futures prices for shorter expiration Futures Contracts is referred to as ''backwardation.'' The presence of contango in certain Futures Contracts at the time of rolling could adversely affect a Fund with long positions, and positively affect a Fund with short positions. Similarly, the presence of backwardation in certain Futures Contracts[11] at the time of rolling such contracts could adversely affect a Fund with short positions and positively affect a Fund with long positions.

II. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2019–02 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[15] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[16] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.''[17]

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested

each day compounded over the period and thus will usually differ from a Fund's multiple times the return of the Benchmark for the same period.

[12] The term ''normal market conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. *See* NYSE Arca Rule 8.600–E(c)(5).

[13] A Futures Contract is a standardized contract traded on, or subject to the rules of, an exchange that calls for the future delivery of a specified quantity and type of a particular underlying asset at a specified time and place or alternatively may call for cash settlement. The notional size and calendar term Futures Contracts on a particular underlying asset are identical and are not subject to any negotiation, other than with respect to price and the number of contracts traded between the buyer and seller.

[14] Many designated contract markets, such as the NYMEX, have established accountability levels and position limits on the maximum net long or net short futures contracts in commodity interests that any person or group of persons under common trading control may hold, own or control. In addition, NYMEX also sets price fluctuation limits on futures contracts. Options do not have individual price limits but rather are linked to the price limit of Futures Contracts.

[11] The Funds may invest in options on Futures Contracts. Unlike Futures Contracts, which the Funds intend to roll before expiration, the Funds intend to hold ''in-the-money'' options on Futures Contracts to expiration. The Funds would exercise in-the-money options on Futures Contracts at expiration of the options contract and they would settle through receipt or delivery of the underlying Futures Contracts. Out-of-the money options will be held to expiration and will be expired worthless. Options on Futures Contracts are subject to the effects of contango and backwardation to the same general extent as their underlying Futures Contracts.

[15] 15 U.S.C. 78s(b)(2)(B).

[16] *Id.*

[17] 15 U.S.C. 78f(b)(5).

persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[18]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by June 11, 2019. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 25, 2019. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

In particular, the Exchange states that each Fund may obtain exposure to the Benchmark through investment in OTC Financial Instruments under certain conditions, including situations where the Sponsor deems it impractical or inadvisable to buy or sell Futures Contracts (such as during periods of market volatility or illiquidity). The Commission seeks commenters' views on whether the Exchange has described in sufficient detail the conditions where the Sponsor deems it impractical or inadvisable to buy or sell Futures Contracts to enable the Funds to obtain exposure to the Benchmark through investment in OTC Financial Instruments.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2019–02 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2019–02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2019–02 and should be submitted by June 11, 2019. Rebuttal comments should be submitted by June 25, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10509 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[18] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[19] 17 CFR 200.30–3(a)(12) & 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85861; File No. SR–NASDAQ–2019–036]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Equity 7, Section 118(a)

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 1, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at fees at Equity 7, Section 118(a) to: (1) Adopt two new credits tiers available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes [3] that provide liquidity; (2) adopt a new credit tier for midpoint orders (other than Supplemental Orders) that provide liquidity; (3) amend the qualification criteria required to receive a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity; and (4) lower a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com/,* at the principal office of the Exchange, and at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Tape C securities are those that are listed on the Exchange, Tape A securities are those that are listed on NYSE, and Tape B securities are those that are listed on exchanges other than Nasdaq or NYSE. Under Nasdaq's rules, Section 118(a)(1) concerns fees for execution and routing of Tape C securities, Section 118(a)(2) concerns fees for execution and routing of Tape A securities, and Section 118(a)(3) concerns fees for execution and routing of Tape B securities.

the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's transaction fees at Equity 7, Section 118(a) to: (1) Adopt two new credit tiers available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes [4] that provide liquidity; (2) adopt a new credit tier for midpoint orders (other than Supplemental Orders) that provide liquidity; (3) amend the qualification criteria required to receive a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity; and (4) lower a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity.

First New Credit

The Exchange is proposing to adopt a new $0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3) for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity provided to a member: (i) With shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.60% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.225% of Consolidated Volume during the month.

Second New Credit

The Exchange is proposing to adopt a new $0.0029 per share executed credit tier under Sections 118(a)(1), (2) and (3) for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity provided to a member: (i) With shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.30% of Consolidated Volume during the month and (ii) member qualifies for the MARS program on The Nasdaq Options Market (''NOM'') during the month. The Market Access and Routing Subsidy or ''MARS'' program is an NOM incentive program designed to increase market quality by providing payments to Participants in return for market-improving behavior.[5] Nasdaq currently provides a $0.0030 per share executed credit under Sections 118(a)(1), (2) and (3) to members: (i) With shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.50% of Consolidated Volume during the month and (ii) member qualifies for Tier 4 [6] of the MARS program on The Nasdaq Options Market during the month.

Third New Credit

The Exchange is proposing to adopt a new $0.0013 per share executed credit tier under Section 118(a)(1) for midpoint orders in Tape C securities that provide liquidity and adopt a new $0.0019 per share executed credit tier under Sections 118(a)(2) and (3) for midpoint orders in Tape A and B securities, respectively, that provide liquidity. The new credits would be provided to a member that (i) executes a combined volume of 1 million or more shares in midpoint orders provided and Midpoint Extended Life Orders executed during the month through one or more of its Nasdaq Market Center MPIDs and (ii) has a 10% or greater increase in midpoint orders provided and Midpoint Extended Life Orders executed through one or more of its Nasdaq Market Center MPIDs during the month over the month of April 2019. A Midpoint Extended Life Order is an Order Type with a Non-Display Order Attribute that is priced at the midpoint between the NBBO and that will not be eligible to execute until a minimum period of one half of a second has passed after acceptance of the Order by the System.[7]

Amended Credit Tier Criteria

The Exchange is proposing to amend the qualification criteria required to receive a $0.0027 per share executed credit under Sections 118(a)(1), (2) and (3) provided to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity. Currently, the credit is provided to a member (i) with shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.65% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.10% of Consolidated Volume during the month. The Exchange is proposing to decrease the level of Consolidated Volume under (i) of the tier from more than 0.65% to more than 0.50% and increase the level of Consolidated Volume under (ii) of the tier from more than 0.10% to more than 0.175%.

Decreased Credit

The Exchange is proposing to decrease a credit under Sections 118(a)(1), (2) and (3) available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity. Currently, the

[4] Tape C securities are those that are listed on the Exchange, Tape A securities are those that are listed on NYSE, and Tape B securities are those that are listed on exchanges other than Nasdaq or NYSE. Under Nasdaq's rules, Section 118(a)(1) concerns fees for execution and routing of Tape C securities, Section 118(a)(2) concerns fees for execution and routing of Tape A securities, and Section 118(a)(3) concerns fees for execution and routing of Tape B securities.

[5] *See* Options 7, Section 6. To qualify for MARS, the Participant's routing system (''System'') would be required to: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System would also need to cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the national best bid or offer (''NBBO''), regardless of size or time or (b) orders that establish a new NBBO on NOM's Order Book, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remains solely responsible for implementing and operating its System. *Id.*

[6] There are five MARS payment tiers, each with increasing Average Daily Volume requirements and payments. *Id.*

[7] *See* Rule 4702(b)(14).

Exchange provides a $0.0028 per share executed credit to a member with shares of liquidity provided in the Opening and Closing Crosses, excluding Market-on-Close, Limit-on-Close (other than an Limit-on-Close Order entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET), Market-on-Open, Limit-on-Open, Good-til-Cancelled, and Immediate-or-Cancel orders, through one or more of its Nasdaq Market Center MPIDs that represent more than 0.01% of Consolidated Volume during the month. The Exchange is proposing to reduce the credit available from $0.0028 per share executed to $0.0027 per share executed.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [11] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[12] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [13]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [14]

As a general principle, the Exchange chooses to offer credits to members in return for market improving behavior. Equity 7, Section 118(a) sets forth the various credits available to members, which require a member to significantly contribute to market quality by providing certain levels of Consolidated Volume through one or more of its Nasdaq Market Center MPIDs, volume on NOM, as well as other market-improving activity. The three new credit tiers are reflective of the Exchange's efforts to improve market quality in all three Tapes by providing members with differing levels of incentive in return for market-improving activity. The proposed increase to the qualification requirements of the amended credit tier is similarly reflective of the Exchange's desire to provide incentives to improve market quality, while also balancing the need to keep the incentives provided in-line with the market-improving activity required. From time to time, the Exchange must evaluate the effectiveness of its fee and credit tiers in relation to the criteria required to qualify for them, and to make adjustments to them when appropriate. In this case, the Exchange has determined that the credit tier qualification criteria may be increased without a material impact on the number of members that would qualify for the credit. Similarly, the decrease in the credit available is reflective of the Exchange's determination that the level of credit available may be decreased without a significant impact to the number of members that qualify for the credit.

First New Credit

The Exchange believes that the proposed $0.0028 per share executed credit is reasonable because it is similar to existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. As described above, the Exchange currently provides a $0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3).[15] The Exchange also has a $0.0027 per share executed credit tier, which requires a member to have (i) shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.65% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.10% of Consolidated Volume during the month. Thus, the amount of the proposed credit is the same as other credits currently available to members, and there are other similar credit opportunities available to members with different qualification criteria should a member choose not to qualify for the proposed credit.

The Exchange believes that the proposed $0.0028 per share executed credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The qualification criteria of the proposed credit is set at a sufficiently high level to reflect the significant credit a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of Consolidated Volume is too high, it has other opportunities to receive credits, which have different qualification criteria, as described above.

Second New Credit

The Exchange believes that the proposed $0.0029 per share executed credit is reasonable because it is similar to existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. For example, the Exchange currently provides a $0.0029 per share executed credit tier under Sections 118(a)(1), (2) and (3) provided to a

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[11] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[12] *See NetCoalition,* at 534–535.

[13] *Id.* at 537.

[14] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] To qualify for the credit, a member must have shares of liquidity provided in the Opening and Closing Crosses, excluding Market-on-Close, Limit-on-Close (other than an Limit-on-Close Order entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET), Market-on-Open, Limit-on-Open, Good-til-Cancelled, and Immediate-or-Cancel orders, through one or more of its Nasdaq Market Center MPIDs that represent more than 0.01% of Consolidated Volume during the month. *See* Equity 7, Section 118(a)(1), (2) and (3).

member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.60% of Consolidated Volume during the month. As described above, the Exchange also has a $0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3) with different qualification criteria.[16] Thus, the amount of the proposed credit is the same as other credits currently available to members, and there are other similar credit opportunities available to members with different qualification criteria should a member choose not to qualify for the proposed credit.

The Exchange believes that the proposed $0.0029 per share executed credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The qualification criteria of the proposed credit is set at a sufficiently high level to reflect the significant credit a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of Consolidated Volume is too high, or if it does not participate on NOM, it has other opportunities to receive similar credits, which require less Consolidated Volume as described above.

Third New Credit

The Exchange believes that the proposed $0.0013 and $0.0019 per share executed credits are reasonable because they are similar to existing credits available on the Exchange for midpoint orders that provide liquidity. The Exchange currently provides a midpoint order credit of $0.0017 per share executed under Section 118(a)(1) and $0.0020 per share executed Sections 118(a)(2) and (3). To be eligible for these existing midpoint order credits, a member must provide an average daily volume of 3 million or more shares through midpoint orders during the month. The proposed new midpoint order credits are lower than the current credits described above because of the lower qualification criteria of the proposed credits.

The Exchange believes that the proposed $0.0013 and $0.0019 per share executed credits are an equitable allocation and are not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The proposed criteria for the new midpoint credits requires members to execute a combined minimum volume of 1 million shares comprising of midpoint orders provided and Midpoint Extended Life Orders executed, and to demonstrate an increase of 10% or more in midpoint orders provided and Midpoint Extended Life Orders executed through one or more of its Nasdaq Market Center MPIDs during the month over the month of April 2019. Thus, members are provided incentive to increase the overall level of midpoint orders and Midpoint Extended Life Orders transacted over its trading in April 2019, in turn improving liquidity in midpoint orders and Midpoint Extended Life Orders. The Exchange chose April 2019 because it is reflective of a member's most recent trading in midpoint orders and Midpoint Extended Life Orders, thereby setting a baseline for a member's midpoint order and Midpoint Extended Life Order trading prior to the credit's effectiveness. The Exchange believes that the qualification criteria of the proposed credit tiers is set at a sufficiently high level to reflect the significant credits a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of shares of midpoint orders and Midpoint Extended Life Orders is too high, it has other opportunities to receive credits for midpoint orders, including the $0.0010 per share executed credit for all other midpoint orders under Section 118(a)(1) and the $0.0014 per share executed credit for all other midpoint orders under Sections 118(a)(2) and (3).

Amended Credit Tier Criteria

The Exchange believes that the amount of the proposed amended credit tier is reasonable because the amount of the credit is remaining unchanged. The proposed changes to the qualification criteria are reasonable because the Exchange believes that an increase in the criteria should not decrease the number of members that will qualify for the credit. As described above, the Exchange must evaluate the effectiveness of its fee and credit tiers in relation to the criteria required to qualify for them, and to make adjustments to them when appropriate.

The Exchange believes that the proposed amended credit qualification criteria is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit criteria to all members and provide the credit to all members that meet the qualification criteria, unless that member qualifies for a larger credit. The proposed qualification criteria of the credit is set at a sufficiently high level to reflect the significant credits a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of Consolidated Volume is too high, it has other opportunities to receive credits, which require less Consolidated Volume.

Decreased Credit

The Exchange believes that the proposed amended credit is reasonable because the amount of the credit given is the same as existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. For example, the Exchange provides a $0.0027 per share executed credit tier under Sections 118(a)(1), (2) and (3) available to a member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.30% of Consolidated Volume during the month.

The Exchange believes that the proposed amended credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The proposed qualification criteria of the proposed credit is set at a sufficiently high level to reflect the significant credits a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of Consolidated Volume is too high, it has other opportunities to receive credits, which require less Consolidated Volume.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain

[16] *Id.*

competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the Exchange is adopting new credit opportunities for members. Thus, the proposed change provides another opportunity for members to receive a credit based on their market-improving behavior and is reflective of the highly competitive market in which the Exchange operates. The new credit tiers may attract greater order flow to the Exchange, which would benefit all market participants on Nasdaq. The proposed amended criteria for an existing credit and proposed reduced credit are reflective of the need to periodically calibrate the criteria required to receive credits. The Exchange has limited resources with which to apply to credits. Given the competitive environment among exchanges and other trading venues, the Exchange must ensure that it is requiring the most beneficial market activity for a credit that is permitted in the competitive landscape for order flow. In this regard, the Exchange notes that other market venues are free to adopt the same or similar credits and incentives as a competitive response to this proposed change. Moreover, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result and, conversely, if the proposal is successful at attracting greater volume to the Exchange other market venues are free to make similar changes as a competitive response. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[17]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2019–036 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2019–036. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2019–036 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10508 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85864; File No. SR–NYSE–2019–24]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List

May 15, 2019.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on May 9, 2019, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to modify the (1) charges for transactions that remove liquidity from the Exchange; (2) requirements for credits related to executions of orders sent to Floor brokers that add liquidity on the Exchange; and (3) remove Tier

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

fee for securities traded pursuant to Unlisted Trading Privileges (''UTP'') (Tapes B and C). The Exchange proposes to implement these changes to its Price List effective May 9, 2019. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to modify the (1) charges for transactions that remove liquidity from the Exchange; (2) requirements for credits related to executions of orders sent to Floor brokers that add liquidity on the Exchange; and (3) Remove Tier fee for UTP securities.

The Exchange proposes to implement these changes to its Price List effective May 9, 2019.[4]

Charges for Removing Liquidity

Currently, the Exchange charges a fee of $0.00275 for non-Floor broker transactions that remove liquidity from the Exchange, including those of DMMs. The Exchange also currently charges $0.00280 for non-Floor broker transactions that remove liquidity from the Exchange by member organizations with an Adding ADV,[5] excluding any liquidity added by a DMM, that is more than 250,000 ADV on the NYSE in Tape A Securities and less than 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month. Finally, the Exchange currently charges $0.0030 for non-Floor broker transactions that remove liquidity from the Exchange by member organizations with an Adding ADV, excluding any liquidity added by a DMM, that is less than 250,000 ADV on the NYSE during the billing month.

Under the current configuration, the effective base rate is $0.0030 because member organizations with an Adding ADV, excluding liquidity added by a DMM, that is less than 250,000 ADV in Tape A Securities during the billing month would not qualify for the $0.00275 rate, which applies unless one of the charges set forth immediately below it in the Price List applies. The Exchange proposes a reconfiguration to reflect the current $0.0030 base rate and a fee of $0.00275 for non-Floor broker transactions that remove liquidity from the Exchange by member organizations with an Adding ADV, excluding any liquidity added by a DMM, of at least 250,000 ADV on the NYSE in Tape A Securities and at least 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month. The charge for non-Floor broker transactions that remove liquidity from the Exchange by member organizations with an Adding ADV, excluding any liquidity added by a DMM, that is at least 250,000 ADV on the NYSE in Tape A Securities and less than 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month would increase from $0.00280 to $0.00285.

Floor Broker Credits for Orders That Add Liquidity to the Exchange

The Exchange currently provides a per share credit for executions of orders sent to a Floor broker for representation on the Exchange when adding liquidity to the Exchange if the member organization has an ADV that adds liquidity to the Exchange by a Floor broker during the billing month that is at least equal to certain thresholds. In order to qualify for a credit of $0.0020 per share under the first threshold, the member organization must have an ADV that adds liquidity to the Exchange by a Floor broker during the billing month that is at least equal to .07% of Tape A CADV. In order to qualify for a credit of $0.0022 per share under the second threshold, a member organization must have an ADV that adds liquidity to the Exchange by a Floor broker during the billing month that is at least equal to .33% of Tape A CADV.

The Exchange proposes an intermediate third threshold designated (b) that would provide a credit of $0.0021 per share for a member organization must have an ADV that adds liquidity to the Exchange by a Floor broker during the billing month that is at least equal to .25% of Tape A CADV. The current second threshold would become item (c).

Remove Tier Fee for UTP Securities

For UTP Securities, the Exchange currently charges a per tape fee of $0.0028 per share to remove liquidity from the Exchange for member organizations with an Adding ADV of at least 50,000 shares for that respective tape. The Exchange proposes to charge a per tape fee of $0.00285 per share to remove liquidity from the Exchange for member organizations with an Adding ADV of at least 50,000 shares for that respective tape.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any problems that member organizations would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

Charges for Removing Liquidity

The Exchange believes that reconfiguring the charges for non-Floor broker transactions that remove liquidity from the Exchange and introducing a slightly tiered rate of $0.00285 is reasonable, equitable and not unfairly discriminatory, as follows.

The Exchange believes that the proposed rate change for member organizations will incentivize submission of additional liquidity in Tape B and Tape C securities to a public exchange to qualify for the lower fee of $0.00275 for removing liquidity, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. The Exchange also believes that the proposed change is equitable because it would apply to all similarly situated member organizations that add liquidity in Tape B or Tape C securities. The proposed change also is equitable and not unfairly discriminatory because it would be

[4] The Exchange originally filed to amend the Price List on May 1, 2019 (SR–NYSE–2019–23) and withdrew such filing on May 9, 2019. This filing replaces SR–NYSE–2019–23 in its entirety.

[5] Footnote 2 to the Price List defines ADV as ''average daily volume'' and ''Adding ADV'' as ADV that adds liquidity to the Exchange during the billing month.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) & (5).

consistent with the applicable rate on other marketplaces. For example, Nasdaq PSX provides a fee per share for removing liquidity, $0.0028 in Tape A and B securities and $0.0029 in Tape C securities, if a firm removes 0.065% or more of Consolidated Volume; otherwise, Nasdaq PSX imposes a charge of $0.0030 per share for removing liquidity.[8] The Exchange notes that since the requirement is for Tape B and Tape C securities combined, member organizations can meet the requirement by adding liquidity in either Tape B or Tape C securities, or both. The Exchange further notes that other marketplaces have tiers with adding requirements in specific tapes to qualify for a rate in securities on another tape. For example, to be eligible for a $0.0020 adding credit in Tape C securities on Nasdaq, firms are required to average a minimum of 250,000 shares added per day in Tape A or Tape B securities (combined); otherwise, the Tape C credit for adding liquidity is $0.0015.[9]

Floor Broker Credits for Orders That Add Liquidity to the Exchange

The Exchange believes that the changes proposed additional tiered credit for executions of orders sent to a Floor broker for representation on the Exchange is reasonable because it would encourage additional displayed liquidity on the Exchange. The proposed change would also encourage the execution of such transactions on a public exchange, thereby promoting price discovery and transparency. The Exchange believes the proposed change is equitable and not unfairly discriminatory because it would continue to encourage member organizations to send orders to the Floor for execution, thereby contributing to robust levels of liquidity on the Floor, which benefits all market participants. The proposed change is also equitable and not unfairly discriminatory because those member organizations that make significant contributions to market quality and that contribute to price discovery by providing higher volumes of liquidity would continue to be allocated a higher credit. The Exchange believes that any member organizations that may currently be qualifying under the lower of the two existing thresholds, or 0.0007%, could qualify for the proposed intermediate threshold of 0.0025% based on the levels of activity sent to Floor brokers. The proposed change also is equitable and not unfairly discriminatory because all similarly situated member organizations would pay the same rate, as is currently the case, and because all member organizations would be eligible to qualify for the rate by satisfying the related thresholds.

Remove Tier Credit for UTP Securities

The Exchange believes that proposed Tier 1 charge of $0.00285 per share in UTP Securities for member organizations with an Adding ADV of at least 50,000 shares that removes liquidity from the Exchange is reasonable, equitable and not unfairly discriminatory because the proposed fees are in line with the fees the Exchange currently charges for removing liquidity from the Exchange in Tape A securities and the proposed changes thereto described above.[10]

The Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed changes would foster liquidity provision and stability in the marketplace, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. In this regard, the Exchange believes that the transparency and competitiveness of attracting additional executions on an exchange market would encourage competition.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed changes will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act,[12] and subparagraph (f)(2) of Rule 19b–4[13] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[8] *See https://www.nasdaqtrader.com/Trader.aspx?id=PSX_Pricing.*

[9] *See https://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.*

[10] *See* pages 5–6 of the current NYSE Price List, available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.*

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 15 U.S.C. 78s(b)(2)(B).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2019–24 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2019–24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2019–24 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10515 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85862; File No. SR–Phlx–2019–19]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Equity 7, Section 3 To Adopt a Qualified Market Maker Program and a Related Credit, and To Modify Two Existing Fees

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 1, 2019, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Equity 7, Section 3 to adopt a Qualified Market Maker Program and a related credit, and to modify two existing fees, as described further below. The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Equity 7, Section 3 to: (i) Adopt a Qualified Market Maker Program and a related credit; and (ii) amend two existing fees.

The first purpose of this change is to adopt a Qualified Market Maker (''QMM'') Program and a related fee. A QMM is a member organization that makes a significant contribution to market quality by providing liquidity at the national best bid and offer (''NBBO'') in a large number of securities for a significant portion of the day. A QMM may be, but is not required to be, a registered market maker in any security; thus, the QMM designation does not by itself impose a two-sided quotation obligation or convey any of the benefits associated with being a registered market maker. The designation will, however, reflect the QMM's commitment to provide meaningful and consistent support to market quality and price discovery by extensive quoting at the NBBO in a large number of securities. Thus, the program is designed to attract liquidity both from traditional market makers and from other firms that are willing to commit capital to support liquidity at the NBBO. In return for providing the required contribution of market-improving liquidity, a QMM will be provided with a supplemental credit for executions of displayed orders in securities in Tape A priced at $1 or more per share that provide liquidity on the Exchange System. Through the use of this incentive, the Exchange hopes to provide improved trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the inside market. In addition, the program reflects an effort to use financial incentives to encourage a wider variety of members to make positive commitments to promote market quality. To be designated as a QMM, a member organization must quote at the NBBO at least 10% of the time during regular market hours in an average of at least 750 securities per day during a month. In return for its contributions, the Exchange will provide a credit for executions of displayed orders in securities priced at $1 or more per share that provide liquidity on the Exchange System. Specifically, the Exchange is proposing to provide a credit of $0.0002 per share executed with respect to all displayed orders in securities in Tape A priced at

$1 or more per share that provide liquidity. This credit will be in addition to any credit that the Exchange provides under Equity 7, Section 3.

The second purpose of this change is to amend two fees that the Exchange charges to member organizations that enter orders on the Exchange that access more than certain specified volumes during a month. For a member organization that accesses 0.065% or more of Consolidated Volume [3] during a month, the Exchange presently charges a fee of $0.0029 per share executed in Nasdaq-Listed Securities, a fee of $0.0028 per share executed in NYSE-Listed Securities, and a fee of $0.0028 per share executed in Securities Listed on Exchanges other than Nasdaq and NYSE. The Exchange also charges a $0.0030 per share executed fee for all other member organizations.

The Exchange proposes to increase, from $0.0028 per share executed to $0.0029 per share executed, its fees in NYSE-listed securities and in securities listed on exchanges other than NYSE and Nasdaq for member organizations that access 0.065% or more of Consolidated Volume during a month. This proposed change will equalize the Exchange's liquidity removal fees for securities in all three Tapes for member organizations that access 0.065% or more of Consolidated Volume during a month. The Exchange will continue to assess a $0.0030 per share executed fee to all other member organizations that remove liquidity from the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [6]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [7] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [9]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [10] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposed supplemental $0.0002 per share executed credit for displayed orders of QMMs in securities in Tape A priced at $1 or more per share that provide liquidity is reasonable because it is similar to other credits offered by the Exchange for displayed orders that provide liquidity. In addition to the proposed $0.0002 per share executed credit described above, the Exchange also has other credit tiers for displayed orders ranging from $0.0030 per share executed to $0.0023 per share executed. The proposed credit will provide an opportunity to member organizations to receive an additional credit in return for certain levels of participation on the Exchange as measured by quoting at the NBBO. The proposed credit is set at a level that is reflective of the beneficial contributions of market participants that quote significantly at the NBBO for a wide range of symbols. The Exchange believes that it is appropriate to limit applicability of the proposed credit to displayed orders in securities in Tape A insofar as the Exchange seeks to incentivize member organizations to add liquidity to the Exchange in such securities and improve the market therefor.

The Exchange believes that the proposed $0.0002 per share executed credit and qualification criteria of the QMM Program are an equitable allocation and are not unfairly discriminatory because the Exchange will offer the same credit to all similarly situated member organizations. Moreover, the proposed qualification criteria requires a member to quote significantly at the NBBO therefore contributing to market quality in a meaningful way on the Exchange. Any member organization may quote at the NBBO at the level required by the qualification criteria of the QMM Program. The Exchange notes that Nasdaq and BX also have similar QMM programs in which Nasdaq and BX members are required to quote at the NBBO more than a certain amount of time during regular market hours.[11] For these reasons, the Exchange believes that the proposed QMM Program credit and qualification criteria are an equitable allocation and are not unfairly discriminatory.

Likewise, the Exchange believes that it is reasonable to increase its per share executed fees, for orders in securities (i) listed on NYSE and (ii) on exchanges other than NYSE and Nasdaq, which it assesses to member organizations that access at least 0.065% of Consolidated Volume during a month. This proposal will equalize the fees for executions of securities in all three Tapes that the Exchange assesses to members that access liquidity of at least 0.065% of Consolidated Volume in a month.

[3] As used in Equity 7, Section 3, the term ''Consolidated Volume'' means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes are excluded from both total Consolidated Volume and the member's trading activity.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[7] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[8] *See NetCoalition,* at 534—535.

[9] *Id.* at 537.

[10] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[11] See Nasdaq Equity 7, Section 114(d); BX Equity 7, Section 118(f). In contrast to the Exchange's proposal, Nasdaq and BX require members to quote at the NBBO more than 25% of the time. Nasdaq also requires a member to quote at the NBBO in an average of at least 1,000 securities per day during the month, while BX requires a member to quote at the NBBO in an average of at least 400 securities during the month. BX also charges a fee, rather than assesses a credit, due to the fact that it operates on the ''taker-maker'' model.

The proposal is equitable and is not unfairly discriminatory because the Exchange proposes to offer the same credits to all similarly situated members and because the increased fees will be the same for securities in all three Tapes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the Exchange's fees assessed and credits provided to member organizations do not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The proposed QMM Program credit provides member organizations with the opportunity to be assessed higher credits for transactions if they improve the market by providing significant quoting at the NBBO in a large number of securities which the Exchange believes will improve market quality. The proposed increases to fees that the Exchange assesses to member organizations that access at least 0.0065% [sic] of Consolidated Volume during a month are intended to harmonize these fees for executions of orders in all three Tapes.

In sum, the proposed changes are designed to make the Exchange a more desirable venue on which to transact; however, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2019–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2019–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2019–19 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10512 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33475; 812–14898]

Nuveen Churchill BDC LLC, *et al.*

May 15, 2019.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment funds and accounts.

Applicants: Nuveen Churchill BDC LLC, Nuveen Fund Advisors, LLC (''NFA''), Nuveen Alternatives Advisors LLC (''NAA''), Churchill Asset Management LLC (''CAM''), Nuveen Asset Management, LLC, Symphony Asset Management LLC, Teachers Advisors, LLC, Teachers Insurance and Annuity Association of America (''TIAA''), MM Funding, LLC, Churchill Middle Market Senior Loan Fund, LP, Churchill Middle Market Senior Loan Fund, Offshore LP, TGAM Churchill Middle Market Senior Loan Fund K, LP, TIAA Churchill Middle Market CLO I Ltd., TIAA Churchill Middle Market CLO II Ltd., Churchill Middle Market CLO IV Ltd., Churchill Middle Market CLO V Ltd., TPS Investors Master Fund, LP, TPS Investors Finance, Inc., TPS Investors Operating Fund, LLC, NAP Investors Fund, L.P., Nuveen Junior Capital Opportunities Fund, SCSp, Churchill Middle Market Senior Loan Fund II—K (Unlevered), LP, Churchill Middle Market Senior Loan Fund II—European Fund, SCSp, Churchill Middle Market Senior Loan Fund II—European Co-Invest Fund, SCSp, Churchill Middle Market Senior Loan Fund II—Master Fund, LP, Churchill Middle Market Senior Loan Fund II—PS Co-Invest Fund, LP and PS FinCo, Inc.

FILING DATES: The application was filed on April 19, 2018, and amended on October 23, 2018 and March 25, 2019. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 6, 2019, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F St. NE, Washington, DC 20549–1090. Applicants: Keith Jones, 100 Park Ave., 36th Floor, New York, NY 10017; John McCally, 8500 Andrew Carnegie Blvd., Charlotte, NC 28262; Christopher Rohrbacher, 333 W. Wacker Dr., 33rd Floor, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Jennifer O. Palmer, Senior Counsel, at (303) 844–1012, or David J. Marcinkus, Branch Chief, at (202) 551–6821 (Chief Counsel's Office, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction

1. The Applicants request an order of the Commission under Sections 17(d) and 57(i) and Rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other Regulated Funds and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or its Wholly-Owned Investment Sub, defined below) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

Applicants

2. The Existing Regulated Fund is a Delaware limited liability company. Prior to relying on the requested Order, the Existing Regulated Fund will have filed an election to be regulated as a business development company (''BDC'') under the Act.[4] The Existing Regulated Fund's Board [5] will be comprised of a majority of members who are Independent Directors.[6]

3. NFA will serve as the investment adviser to the Existing Regulated Fund. NAA and CAM will serve as investment sub-advisers to the Existing Regulated Fund. Each of NFA, NAA and CAM is a Delaware limited liability company that is registered under the Advisers Act.

4. The Existing Affiliated Funds are the TIAA Accounts [7] and the investment vehicles identified in Exhibit B to the application. Applicants represent that

[1] ''Regulated Funds'' means Nuveen Churchill BDC LLC (the ''Existing Regulated Fund'') and any Future Regulated Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the program of co-investment described in the Application.

''Adviser'' means any Existing Adviser and any Future Adviser. The term Adviser does not include any primary investment adviser to an Affiliated Fund (defined below) or a Regulated Fund (defined below) whose sub-adviser is an Adviser, except that such primary investment adviser is deemed to be an Adviser for purposes of Conditions 2(c)(iv), 13 and 14 only. The primary investment adviser to an Affiliated Fund or a Regulated Fund whose sub-adviser is an Adviser will not source any Potential Co-Investment Transactions under the requested Order. ''Existing Adviser'' means NAA, CAM, NFA, Nuveen Asset Management, LLC, Symphony Asset Management LLC, and Teachers Advisors, LLC. ''Future Adviser'' means any investment adviser that in the future (i) is controlled by TIAA, (ii) (a) is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act'') or (b) is a relying adviser of an investment adviser that is registered under the Advisers Act and that is controlled by TIAA, and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[2] ''Affiliated Fund'' means any Existing Affiliated Fund (defined below) or any Future Affiliated Fund. ''Future Affiliated Fund'' means an entity (a) whose investment adviser or sub-adviser is an Adviser, (b)(i)(x) that would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act or (y) relies on Rule 3a-7 under the Act, or (ii) that does not meet the definition of investment company under the Act and qualifies as a REIT within the meaning of Section 856 of the Code because substantially all of its assets would consist of real properties, and (c) that intends to participate in the program of co-investment described in the application; provided that an entity sub-advised by an Adviser is not included in this term with respect to such Affiliated Fund if: (i) such Adviser serving as sub-adviser does not control the entity, and (ii) the primary investment adviser is not an Adviser.

[3] All existing entities that currently intend to rely on the Order have been named as Applicants and any existing or future entities that may rely on the Order in the future will comply with its terms and Conditions set forth in the application.

[4] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in Section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[5] ''Board'' means the board of directors (or the equivalent) of a Regulated Fund.

[6] ''Independent Director'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in Section 2(a)(19) of the Act. No Independent Director of a Regulated Fund will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Regulated Funds.

[7] ''TIAA Accounts'' means TIAA, MM Funding, LLC (a Delaware limited liability company and a direct, wholly-owned subsidiary of TIAA) and any future direct or indirect wholly-owned or majority-owned subsidiaries of TIAA that intend to participate in the Co-Investment Transactions. Any existing or future TIAA Account or portion thereof that participates in Co-Investment Transactions is, or will be, advised by an Adviser.

each investment vehicle identified in Exhibit B is a separate and distinct legal entity and each (i) would be an investment company but for Section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act, or (ii) does not meet the definition of investment company under the Act and qualifies as a real estate investment trust (''REIT'') within the meaning of Section 856 of the Internal Revenue Code (the ''Code''), as amended, because substantially all of its assets would consist of real properties. Certain of the Existing Advisers serve as investment advisers and sub-advisers to the Existing Affiliated Funds.

5. Each of the Applicants may be deemed to be directly or indirectly controlled by Nuveen, LLC (''Nuveen''), which in turn is controlled by TIAA. Nuveen directly owns controlling interests in the Advisers, and thus may be deemed to control the Regulated Funds and the Affiliated Funds. Applicants state that Nuveen is a holding company and does not currently offer investment advisory services to any person and is not expected to do so in the future. Applicants state that as a result, Nuveen has not been included as an Applicant.

6. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[8] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Entity for purposes of Section 57(a)(4) and Rule 17d–1 . Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Entity that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

7. Applicants state that the Advisers are presented with thousands of investment opportunities each year on behalf of their clients and the Advisers must determine how to allocate those opportunities in a manner that, over time, is fair and equitable to all of its clients. Such investment opportunities may be Potential Co-Investment Transactions.

8. Applicants represent that the Existing Advisers have established, and each Future Adviser will establish, processes for allocating initial investment opportunities, opportunities for subsequent investments in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, Applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and the Affiliated Funds and (ii) comply with the Conditions.

9. Specifically, applicants state that each Existing Adviser is, and each Future Adviser will be, organized and managed such that the portfolio managers and analysts (''Investment Teams'') responsible for evaluating investment opportunities and making investment decisions on behalf of clients are promptly notified of the opportunities. If the requested Order is granted, the Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that, when such opportunities arise, the Advisers to the relevant Regulated Funds are promptly notified and receive the same information about the opportunity as any other Advisers considering the opportunity for their clients. In particular, consistent with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies[9] and any Board-Established Criteria[10] of a Regulated Fund, the policies and procedures will require that the relevant Investment Team responsible for that Regulated Fund receive sufficient information to allow the Regulated Fund's Adviser to make its independent determination and recommendations under the Conditions.

10. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in such Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

11. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser will submit a proposed order amount to an internal allocation committee which the Adviser will establish to handle the allocation of investment opportunities in Potential Co-Investment Transactions (the ''Co-Investment Transaction Allocation Committee''). Applicants state further that, at this stage, each proposed order amount may be reviewed and adjusted, in accordance with the Advisers' written allocation policies and procedures, by the Co-Investment Transaction Allocation Committee.[11] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be

[8] ''Wholly-Owned Investment Sub'' means an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and, in the case of a SBIC Subsidiary (defined below), maintain a license under the SBA Act (defined below) and issue debentures guaranteed by the SBA (defined below)); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) (A) that would be an investment company but for Section 3(c)(1), 3(c)(5)(C), or 3(c)(7) of the Act, (B) relies on Rule 3a-7 under the Act, or (C) qualifies as a REIT within the meaning of Section 856 of the Code because substantially all of its assets would consist of real properties. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the Small Business Administration (the ''SBA'') to operate under the Small Business Investment Act of 1958, as amended, (the ''SBA Act'') as a small business investment company.

[9] ''Objectives and Strategies'' means a Regulated Fund's investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (the ''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders.

[10] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the applicable Regulated Fund's Adviser(s) will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser(s) to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Directors. The Independent Directors of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though Applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[11] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of the Advisers.

submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[12]

12. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be placed with the expectation that it will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[13] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that the Advisers will establish, implement and maintain.[14]

B. Follow-On Investments

13. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments [15] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

14. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[16] If the Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

15. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment [17] or (ii) a Non-Negotiated Follow-On Investment.[18] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

16. Applicants propose that Dispositions [19] would be divided into two categories. If the Regulated Funds and Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[20]

17. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under

[12] ''Required Majority'' means a required majority, as defined in Section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to Section 57(o).

[13] The Advisers will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Directors'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under Section 57(o) of the Act.

[14] The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with condition 2, 6, 7, 8 or 9, as applicable.

[15] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[16] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that: (i) Were acquired prior to participating in any Co-Investment Transaction; (ii) were acquired in transactions in which the only term negotiated by or on behalf of such funds was price; and (iii) were acquired either: (A) In reliance on one of the JT No-Action Letters (defined below); or (B) in transactions occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[17] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Directors in accordance with Condition 8(c).

[18] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters. ''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[19] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[20] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Directors must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

Condition 6(c) if (i) the Disposition is a Pro Rata Disposition [21] or (ii) the securities are Tradable Securities [22] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

18. Applicants represent that under the terms and Conditions of the Application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

19. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares as directed by an independent third party when voting on matters specified in the Condition. Applicants believe that this Condition will ensure that the Independent Directors will act independently in evaluating Co-Investment Transactions, because the ability of the Adviser or its principals to influence the Independent Directors by a suggestion, explicit or implied, that the Independent Directors can be removed will be limited significantly. The Independent Directors shall evaluate and approve any independent party, taking into account its qualifications, reputation for independence, cost to the shareholders, and other factors that they deem relevant.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of Rule 17d–1 and Section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by Rule 17d–1 and/or Section 57(b), as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated Fund within the meaning of section 2(a)(3) by reason of common control because (i) controlled affiliates of TIAA manage each of the Regulated Funds and the Affiliated Funds and may be deemed to control any Future Regulated Fund and Future Affiliated Fund, and (ii) TIAA controls NFA, CAM and NAA, which will manage the Existing Regulated Fund. Thus, each of the Affiliated Funds could be deemed to be a person related to the Existing Regulated Fund in a manner described by Section 57(b) and related to Future Regulated Funds in a manner described by Rule 17d–1 ; and therefore the prohibitions of Rule 17d–1 and Section 57(a)(4) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds.

4. In passing upon applications under rule 17d–1 , the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

5. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by Rule 17d–1 (b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Advisers. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following Conditions:

[21] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Directors.

[22] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Advisers to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a) The Advisers will establish, maintain and implement policies and procedures reasonably designed to ensure that each Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund such Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), it will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the Advisers to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Directors with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Funds and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [23] financial benefit to the Advisers, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by Section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[24] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[25]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the

[23] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[24] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[25] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate. ''Close Affiliate'' means the Advisers, the Regulated Funds, the Affiliated Funds and any other person described in Section 57(b) (after giving effect to Rule 57b-1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in Section 57(b) to Section 2(a)(3)(D). ''Remote Affiliate'' means any person described in Section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i)(A) The participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [26] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 or Rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) *Additional Requirements.* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and Conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b–1) or Rule 17d–1, as applicable;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [27] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of Section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and

[26] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

[27] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) the Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i)(A) the proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[28] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the Application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Directors must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) the amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them *pro rata* based on the size of the Internal Orders, as described in section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds holding investments in the issuer have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Advisers will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b-1) or Rule 17d-1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by Section 57 (as modified by Rule 57b-1) or Rule 17d-1, as applicable;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of Section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities

[28] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or Affiliated Funds, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

(within the meaning of Section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and.

(ii) the aggregate amount recommended by the Advisers to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.(b) of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.* (a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any of the Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Directors, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance.

(d) The Independent Directors will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by Section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under Section 57(f).

12. *Director Independence.* No Independent Director of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[29] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by Section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in Section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by Section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10511 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[29] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85866; File No. SR–PEARL–2019–18]

Self-Regulatory Organizations; Miami PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on May 7, 2019, Miami PEARL, LLC (''MIAX PEARL'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, to allow for $1 strike prices above $200 on additional series of options of certain exchange-traded fund (''ETF'') shares.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, to allow for the interval between strike prices of series of options on ETF shares of the PowerShares QQQ Trust (''QQQ'') and iShares Russell 2000 ETF (''IWM'') to be $1 or greater where the strike price is greater than $200.

Currently, Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, allows for the interval between strike prices of series of options on ETF shares of SPDR S&P 500 ETF (''SPY''), iShares S&P 500 Index ETF (''IVV''), and SPDR Dow Jones Industrial Average ETF (''DIA'') to be $1 or greater where the strike price is greater than $200.[5] Under Exchange Rule 404(g), the interval between strike prices of series of options on ETF shares approved for options trading [6] shall be fixed at a price per share which is reasonably close to the price per share at which the underlying security is traded in the primary market at or about the same time such series of options is first open for trading on the Exchange, or at such intervals as may have been established on another options exchange prior to the initiation of trading on the Exchange.[7] The Exchange generally sets the interval between strike prices of series of options on ETF shares at $5 or greater where the strike price is greater than $200, in accordance with such intervals that have been established on other options exchanges and Exchange Rule 404(g).[8] Specifically, the Exchange proposes to modify the interval setting regime to allow for $1 strike price intervals where the strike price is above $200 for IWM and QQQ options. The Exchange believes that the proposed rule change would make QQQ and IWM options easier for investors and traders to use and more tailored to their investment needs.

Options on QQQ and IWM are designed to provide investors different ways to efficiently gain exposure to the equity markets and execute risk management, hedging, asset allocation and income generation strategies. The QQQ is an investment trust designed to closely track the price and performance of the Nasdaq-100 Index (''NDX''), which represents the largest and most active non-financial domestic and international issues listed on The Nasdaq Stock Market based on market capitalization. Likewise, the IWM is an index ETF designed to closely track the price and performance of the Russell 2000 Index (''RUT''), which represents the small capitalization sector of the U.S. equity market. In general, QQQ and IWM options provide investors with the benefit of trading broader markets in a manageably sized contract.

The value of QQQ is designed to approximate 1/40 the value of the underlying NDX. For example, if the NDX price level is 1400, QQQ strike prices generally would be expected to be priced around $35. The value of IWM is designed to approximate 1/10 the value of the underlying RUT. In the past year, the NDX has climbed above a price level of 7500, and the RUT climbed to a price level of approximately 1700 (both prior to the December 2018 market-wide decline). As the value of the underlying ETF (and the index the ETF tracks) and resulting strike prices for each option continues to appreciate, market participants have requested the listing of additional strike prices ($1 increments) in QQQ and IWM options above $200. The QQQ is among the most actively traded ETFs on the market. It is widely quoted as an indicator of technology stock prices and investor confidence in the technology and telecommunication market spaces, a significant indicator of overall economic health. Similarly, IWM is among the most actively traded ETFs on the market and provides investors with an investment tool to gain exposure to small U.S. public companies. Industry-wide trade volume in QQQ more than doubled from 2017 to 2018. As a result, QQQ options and IWM options have grown to become two of the largest options contracts in terms of trading volume. Investors use these products to diversify their portfolios and benefit from market trends.

Accordingly, the Exchange believes that offering a wider base of QQQ and IWM options affords traders and investors important hedging and trading opportunities, particularly in the midst of current price trends. The Exchange believes that not having the proposed $1 strike price intervals above $200 in QQQ and IWM classes significantly constricts investors' hedging and trading possibilities. The Exchange therefore believes that by having smaller strike intervals in QQQ and IWM, investors would have more efficient hedging and trading opportunities due to the lower $1 interval ascension. The proposed $1 intervals above the $200 strike price will result in having at-the-money series based upon the underlying ETFs moving less than 1%. The Exchange believes that the proposed strike setting regime is in line with the slower movements of broad-based indices. Considering the fact that $1 intervals already exist below the $200 price point and that both QQQ and IWM have consistently inclined in price toward the $200 level, the Exchange believes that continuing to maintain the current $200 level (above which intervals increase 500% to $5), may have a negative effect on investing,

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Exchange Rule 404, Interpretation and Policy .10.

[6] *See* Exchange Rule 402(i).

[7] *See* Exchange Rule 404(g).

[8] *See id.*

trading and hedging opportunities, and volume. The Exchange believes that the investing, trading, and hedging opportunities available with QQQ and IWM options far outweighs any potential negative impact of allowing QQQ and IWM options to trade in more finely tailored intervals above the $200 price point.

The proposed strike setting regime would permit strikes to be set to more closely reflect the increasing values in the underlying indices and allow investors and traders to roll open positions from a lower strike to a higher strike in conjunction with the price movements of the underlying ETFs. Under the current rule, where the next higher available series would be $5 away above a $200 strike price, the ability to roll such positions is effectively negated. Accordingly, to move a position from a $200 strike to a $205 strike under the current rule, an investor would need for the underlying product to move 2.5%, and would not be able to execute a roll up until such a large movement occurred. As stated, the NDX and RUT have experienced continued, steady growth. The Exchange believes that with the proposed rule change, the investor would be in a significantly safer position of being able to roll his open options position from a $200 to a $201 strike price, which is only a 0.5% move for the underlying. As a result, the proposed rule change will allow the Exchange to better respond to customer demand for QQQ and IWM strike prices more precisely aligned with the smaller, longer-term incremental increases in respective underlying ETFs. The Exchange believes that the proposed rule change, like the other strike price programs currently offered by the Exchange, will benefit investors by providing investors the flexibility to more closely tailor their investment and hedging decisions using QQQ and IWM options. Moreover, by allowing series of QQQ and IWM options to be listed in $1 intervals between strike prices over $200, the proposal will moderately augment the potential total number of options series available on the Exchange. However, the Exchange believes it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this proposed rule change. The Exchange also believes that Members [9] will not have a capacity issue due to the proposed rule change. In addition, the Exchange represents that it does not believe that this expansion will cause fragmentation of liquidity, but rather, believes that finer strike intervals will serve to increase liquidity available as well as price efficiency by providing more trading opportunities for all market participants.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change to Exchange Rule 404, Series of Option Contracts Open for Trading, Interpretation and Policy .10, will allow investors to more easily use QQQ and IWM options. Moreover, the proposed rule change would allow investors to better trade and hedge positions in QQQ and IWM options where the strike price is greater than $200, and ensure that investors in both options are not at a disadvantage simply because of the strike price.

The Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act, which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and the rules and regulations thereunder, and the rules of the Exchange. The rule change proposal allows the Exchange to respond to customer demand to allow QQQ and IWM options to trade in $1 intervals above a $200 strike price. The Exchange does not believe that the proposed rule would create additional capacity issues or affect market functionality.

As noted above, ETF options trade in wider $5 intervals above a $200 strike price, whereby options at or below a $200 strike price trade in $1 intervals. This creates a situation where contracts on the same option class effectively may not be able to execute certain strategies such as, for example, rolling to a higher strike price, simply because of the $200 strike price above which options intervals increase by 500%. This proposal remedies the situation by establishing an exception to the current ETF interval regime for QQQ and IWM options to allow such options to trade in $1 or greater intervals at all strike prices.

The Exchange believes that the proposed rule change, like other strike price programs currently offered by the Exchange, will benefit investors by giving them increased flexibility to more closely tailor their investment and hedging decisions. Moreover, the proposed rule change is consistent with the change adopted by Cboe Exchange, Inc. (''Cboe'').[12]

With regard to the impact of this proposal on system capacity, the Exchange believes it and OPRA have the necessary systems capacity to handle any potential additional traffic associated with this proposed rule change. The Exchange believes that its members will not have a capacity issue as a result of this proposal.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposed rule change will result in additional investment options and opportunities to achieve the investment and trading objectives of market participants seeking efficient trading and hedging vehicles, to the benefit of investors, market participants, and the marketplace in general. Specifically, the Exchange believes that QQQ and IWM options investors and traders will significantly benefit from the availability of finer strike price intervals above a $200 price point. In addition, the interval setting regime the Exchange proposes to apply to QQQ and IWM options is currently applied to SPY, IVV, and DIA options, which are similarly popular and widely traded ETF products and track indexes at similarly high price levels. Thus, the proposed strike setting regime for QQQ and IWM options will allow options on the most actively traded ETFs with index levels at corresponding price

[9] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *See* Securities Exchange Act Release No. 85754 (April 30, 2019), 84 FR 19823 (May 6, 2019) (SR–CBOE–2019–015).

levels to trade pursuant to the same strike setting regime. This will permit investors to employ similar investment and hedging strategies for each of these options.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and subparagraph (f)(6) of Rule 19b–4 thereunder.[14]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [15] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that waiver of this requirement will ensure fair competition among the exchanges by allowing the Exchange to set the interval between strike prices of series of options on ETF shares of QQQ and IWM in a manner consistent with another exchange. Further, the Exchange stated that because the proposed rule change is based on the rules of another Self-Regulatory Organization,[17] it does not introduce any new or novel regulatory issues. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–PEARL–2019–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2019–18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2019–18 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10513 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

[17] *See supra* note 12.

[18] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85854; File No. SR–NYSEArca–2019–01]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust

May 14, 2019.

On January 28, 2019, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares of the Bitwise Bitcoin ETF Trust under NYSE Arca Rule 8.201–E. The proposed rule change was published for comment in the **Federal Register** on February 15, 2019.[3]

On March 29, 2019, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85093 (Feb. 11, 2019), 84 FR 4589 (Feb. 15, 2019).

[4] 15 U.S.C. 78s(b)(2).

determine whether to approve or disapprove the proposed rule change.[5] On May 7, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.[6] As of May 14, 2019, the Commission has received 25 comment letters on the proposal.[7]

The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

I. Exchange's Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to list and trade shares of the Bitwise Bitcoin ETF Trust under NYSE Arca Rule 8.201–E. This Amendment No. 1 to SR–NYSEArca–2019–01 replaces SR–NYSEArca–2019–01 as originally filed and supersedes such filing in its entirety. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the Bitwise Bitcoin ETF Trust (the ''Trust''), under NYSE Arca Rule 8.201–E.[9]

According to the Registration Statement, the Trust will not be registered as an investment company under the Investment Company Act of 1940, as amended,[10] and is not required to register under such act. The Trust is not a commodity pool for purposes of the Commodity Exchange Act, as amended.[11]

The Trust is managed and controlled by Bitwise Investment Advisers, LLC (the ''Sponsor'').

The Trust will offer Shares of the Trust for sale through the Trust's Marketing Agent in ''Creation Units,'' as described below. The Marketing Agent will also assist the Sponsor and the Trust's administrator with certain functions and duties relating to distribution and marketing.

The Exchange represents that the Shares satisfy the requirements of NYSE Arca Rule 8.201–E and thereby qualify for listing on the Exchange.[12]

Operation of the Trust[13]

According to the Registration Statement, the investment objective of the Trust is to provide exposure to bitcoin that is reflective of the actual bitcoin market where investors can purchase and sell bitcoin, less the expenses of the Trust's operation. In seeking to achieve its investment objective, the Trust will hold bitcoin, and in seeking to ensure that the price of the Trust's shares is reflective of the actual bitcoin market, the Trust will value its shares daily based on prices drawn from ten bitcoin exchanges that the Sponsor and its affiliate, Bitwise Index Services, LLC (''Bitwise Index Services'') believe, based on their research and analysis (discussed below), represent substantially all of the economically significant spot trading volume on bitcoin exchanges around the world (the ''Bitwise Daily Bitcoin Reference Price'' or ''Bitcoin Price'').[14]

The Trust will store its bitcoin in custody at a regulated third-party custodian, and will not use derivatives that may subject the Trust to counterparty and credit risks.

The Trust will process all creations and redemptions in-kind, and accrue all fees in bitcoin (rather than cash), as a way of ensuring that the Trust holds the desired amount of bitcoin-per-share under all scenarios. The Trust will not buy or sell bitcoin under any situation other than if the Trust is required to liquidate.

The Sponsor believes that the design of the Trust will enable certain investors to more effectively and efficiently implement strategic and tactical asset allocation strategies that use bitcoin by investing in the Trust's Shares rather than purchasing, holding and trading bitcoin directly, while protecting the Trust from potential concerns around market manipulation and other factors, as explained below.

Bitcoin, Bitcoin Market, Bitcoin Exchanges and Regulation of Bitcoin

The following sections describe bitcoin, including the historical development of bitcoin and the bitcoin network, how a person holds bitcoin, how to use bitcoin in transactions, the ''exchange'' market where bitcoin can be bought, held and sold, and the bitcoin ''over-the-counter'' (''OTC'') market.

[5] *See* Securities Exchange Act Release No. 85461 (Mar. 29, 2019), 84 FR 13339 (Apr. 4, 2019). The Commission designated May 16, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] Amendment No. 1 is available at: *https://www.sec.gov/comments/sr-nysearca-2019-01/srnysearca201901-5461982-184967.pdf.*

[7] Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nysearca-2019-01/srnysearca201901.htm.*

[8] 15 U.S.C. 78s(b)(2)(B).

[9] The Trust is a Delaware statutory trust. On January 10, 2019, the Trust filed with the Commission an initial registration statement on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a) (the ''Securities Act'') (File No. 333–229180). On April 6, 2019, the Trust filed with the Commission Pre-Effective Amendment No. 1 to the initial registration statement (the initial registration statement, as amended by Pre-Effective Amendment No. 1, the ''Registration Statement''). The description of the operation of the Trust herein is based, in part, on the Registration Statement.

[10] 15 U.S.C. 80a–1.

[11] 17 U.S.C. 1.

[12] With respect to the application of Rule 10A–3 (17 CFR 240.10A–3) under the Act, the Trust relies on the exemption contained in Rule 10A–3(c)(7).

[13] The description of the operation of the Trust, the Shares and the bitcoin market contained herein are based, in part, on the Registration Statement. *See* note 9, *supra.*

[14] Bitwise Index Services conducts research upon and provides pricing and indexing data related to the bitcoin market for use by the Trust and other unaffiliated parties. Bitwise Index Services manages the process for collection and dissemination of the Bitcoin Price with input from its Bitwise Crypto Index Committee, which has ultimate responsibility and authority for developing, maintaining and adjusting the Bitcoin Price as well as other cryptoasset data products and indexes. The Committee is composed of three members of the Bitwise leadership team selected for seniority and expertise in indexing, cryptoassets and data engineering. The Committee is advised in this effort by the Bitwise Crypto Index Advisory Board (the ''Advisory Board''), an independent group of leading experts in the fields of both traditional asset indexing and crypto assets with members both internal and external to Bitwise. Advisory Board suggestions are not binding to the Committee. Bitwise Index Services and the Sponsor are referred to herein as ''Bitwise'' throughout unless the explicit clarification of a particular role of either affiliate is required to describe the operations of the Trust. Both Bitwise Index Services and the Sponsor are affiliates of Bitwise Asset Management, Inc.

Bitcoin

According to the Registration Statement, bitcoin is a digital asset that can be transferred among parties via the internet. Unlike other means of electronic payments such as credit card transactions, one of the advantages of bitcoin is that it can be transferred without the use of a central administrator or clearing agency. Because a central party is not necessary to administer bitcoin transactions or maintain the bitcoin ledger, the term decentralized is often used in descriptions of bitcoin.

Bitcoin Network

Bitcoin was first described in a white paper released in 2008 and published under the name ''Satoshi Nakamoto.'' The protocol underlying Bitcoin was subsequently released in 2009 as open source software and currently operates on a worldwide network of computers.

For persons that want to use bitcoins to pay for goods and services in actual transactions, the first step is to download specialized software referred to as a ''bitcoin wallet.'' A user's bitcoin wallet can run on a computer or smartphone, and can be used both to send and to receive bitcoin. Within a bitcoin wallet, a user can generate one or more unique ''bitcoin addresses,'' which are conceptually similar to bank account numbers. After establishing a bitcoin address, a user can send or receive bitcoin from his or her bitcoin address to another user's address. Sending bitcoin from one bitcoin address to another is similar in concept to sending a bank wire from one person's bank account to another person's bank account.

The amount of bitcoin associated with each bitcoin address is listed in a public ledger, referred to as the ''blockchain.'' Copies of the blockchain exist on thousands of computers on the Bitcoin network throughout the internet. A user's bitcoin wallet will either contain a copy of the blockchain or be able to connect with another computer that holds a copy of the blockchain.

When a bitcoin user wishes to transfer bitcoin to another user, the sender must first request a bitcoin address from the recipient. The sender then uses his or her bitcoin wallet software to create a proposed addition (often referred to as a ''transaction'') to the blockchain. The proposal will reduce the sender's address and increase the recipient's address by the amount of bitcoin desired to be transferred. The proposal is completely digital in nature, similar to a file on a computer, and it can be sent to other computers participating in the Bitcoin network.

Bitcoin Transactions

A bitcoin transaction is similar in concept to an irreversible digital check. The transaction contains the sender's bitcoin address, the recipient's bitcoin address, the amount of bitcoin to be sent, a transaction fee and the sender's digital signature. The sender's use of his or her digital signature enables participants on the Bitcoin network to verify the authenticity of the bitcoin transaction.

A user's digital signature is generated via usage of the user's so-called ''private key,'' one of two numbers in a so-called cryptographic ''key pair.'' A key pair consists of a ''public key'' and its corresponding private key, both of which are lengthy alphanumeric codes, derived together and possessing a unique relationship.

Public keys are bitcoin addresses that are publicly known and can accept a bitcoin transfer. Private keys are used to sign transactions that initiate the transfer of bitcoin from a sender's bitcoin address to a recipient's bitcoin address. Only the holder of the private key associated with a particular bitcoin address can digitally sign a transaction proposing a transfer of bitcoin from that particular bitcoin address.

A user's bitcoin address may be safely distributed, but a user's private key must be kept in accordance with appropriate controls and procedures to ensure it is used only for legitimate and intended transactions. Only by using a private key can a bitcoin user create a digital signature to transfer bitcoin to another user. In addition, if an unauthorized third person learns of a user's private key, that third person could forge the user's digital signature and send the user's bitcoin to any arbitrary bitcoin address, thereby stealing the user's bitcoin.

The usage of key pairs is a cornerstone of the Bitcoin network. This is because the use of a private key is the only mechanism by which a bitcoin transaction can be signed. If a private key is lost, the corresponding bitcoin is thereafter permanently non-transferable. Moreover, the theft of a private key enables the thief immediate and unfettered access to the corresponding bitcoin. For large quantities of bitcoin, holders often embrace sophisticated security measures. The Trust will use a regulated, third-party custodian with institutional design controls and redundancies in place to safeguard and hold in custody the bitcoin private keys.

The Bitcoin network incorporates a system to prevent double spending of a single bitcoin. To prevent the possibility of double-spending a single bitcoin, each validated transaction is recorded, time stamped and publicly displayed in a ''block'' in the Bitcoin Blockchain, which is publicly available. Thus, the Bitcoin network provides confirmation against double-spending by memorializing every transaction in the Bitcoin Blockchain, which is publicly accessible and downloaded in part or in whole by all users of the Bitcoin network software program.

The process by which bitcoin are created and bitcoin transactions are verified is called mining. To begin mining, a user, or ''miner,'' can download and run a mining ''client,'' which, like regular Bitcoin network software programs, turns the user's computer into a ''node'' on the Bitcoin network, and in this case has the ability to validate transactions and add new blocks of transactions to the Blockchain.

Miners, through the use of the bitcoin software program, engage in a set of prescribed complex mathematical calculations in order to verify transactions and compete for the right to add a block of verified transactions to the Bitcoin Blockchain and thereby confirm bitcoin transactions included in that block's data. The miner who successfully adds a block of transactions to the Blockchain is rewarded by a grant of bitcoin. The supply of bitcoin is programmatically limited to 21 million bitcoin.

Confirmed and validated bitcoin transactions are recorded in blocks added to the Bitcoin Blockchain. Each block contains the details of some or all of the most recent transactions that are not memorialized in prior blocks, as well as a record of the award of bitcoin to the miner who added the new block. Each unique block can only be solved and added to the Bitcoin Blockchain by one miner; therefore, all individual miners and mining pools on the Bitcoin network must engage in a competitive process of constantly increasing their computing power to improve their likelihood of solving for new blocks. As more miners join the Bitcoin network and its processing power increases, the Bitcoin network adjusts the complexity of a block-solving equation to maintain a predetermined pace of adding a new block to the Bitcoin Blockchain approximately every ten minutes.

Bitcoin Market and Bitcoin Exchanges

In addition to using bitcoin to engage in transactions, investors may purchase and sell bitcoin to speculate as to the value of bitcoin in the bitcoin market, or as a long-term investment to diversify their portfolio. The value of bitcoin

within the market is determined, in part, by the supply of and demand for bitcoin in the bitcoin market, market expectations for the adoption of bitcoin by individuals, the number of merchants that accept bitcoin as a form of payment and the volume of private end-user-to-end-user transactions.

Research conducted by Bitwise Index Services indicates that the vast majority of spot trading volume of bitcoin takes place on ten exchanges, although a number of other smaller exchanges exist as well. Bitcoin exchanges operate websites designed to permit investors to open accounts with the exchange and then purchase and sell bitcoin.

As with conventional stock exchanges, an investor opening a trading account must deposit an accepted government-issued currency into their account with the exchange, or a previously acquired digital asset, before they can purchase or sell assets on the exchange. The process of establishing an account with a bitcoin exchange and trading bitcoin is different from the process of users sending bitcoin from one bitcoin address to another bitcoin address to pay for goods and services. This latter process is an activity that occurs wholly within the confines of the Bitcoin network, while the former is an activity that occurs entirely on private websites.

According to the Registration Statement, Bitwise Index Services' research has led it to believe that the bitcoin market has matured significantly in recent years. In particular, Bitwise Index Services believes that arbitrage on bitcoin exchanges (discussed below) has improved significantly since the introduction of bitcoin futures in December 2017, which fundamentally transformed the bitcoin market by creating a two-sided market and easy hedging for the first time. In addition, subsequent to the introduction of bitcoin futures, in early 2018, a large number of sophisticated market makers entered the bitcoin market, applying large balance sheets and tech-enabled trading platforms that further improved the quality of the market. By summer 2018, most major market makers were either present in the bitcoin market or actively exploring the space. In addition, over the course of 2018, a significant and efficient short lending market in bitcoin developed, with volume growing over the course of the year.

Bitwise Index Services believes that the launch of futures, the arrival of major market makers, and the development of lending combined to dramatically improve the efficiency of the bitcoin market in 2018, creating a dynamic, institutional-quality, two-sided market for the first time. While further developments may be incrementally beneficial to the market, Bitwise Index Services believes that the spot bitcoin market today operates with an efficiency that matches or exceeds that of other major financial markets.

As discussed in more detail below, the Trust will not directly purchase or sell bitcoin. Instead, Authorized Participants will deliver bitcoin to the Trust in exchange for Shares of the Trust, and the Trust will deliver bitcoin to Authorized Participants when those Authorized Participants redeem Shares of the Trust. The Trust will use ten spot exchanges that the Sponsor and Bitwise Index Services believe represent substantially all of the economically significant bitcoin trading volume in the world (outside of capital-controlled countries) in order to derive the Bitwise Daily Bitcoin Reference Price, which it will then use to price its Net Asset Value (''NAV'') at the end of every business day.

Authorized Participants will have the option of purchasing and selling bitcoin used in Creation Basket transactions with the Trust either on bitcoin exchanges or in the ''over-the-counter'' (''OTC'') markets. Over-the-counter trading of bitcoin is generally accomplished via bilateral agreements on a principal-to-principal basis. All risks and issues related to creditworthiness are between the parties directly involved in the transaction.

The Structure and Operation of the Trust Was Designed To Protect Investors and Satisfy Commission Requirements for Bitcoin-Based Exchange Traded Products

The Registration Statement and the Sponsor's submission to the Commission in connection with this filing,[15] seek to explain how the structure and operation of the Trust is designed to protect investors and to respond to the concerns the Commission has raised and the requirements that must be satisfied by any bitcoin-based exchange-traded product set forth in the ''Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust'' (the ''Winklevoss Order'')[16] and the ''Staff Letter: Engaging on Fund Innovation and Cryptocurrency-related Holdings'' (the ''Staff Letter'').[17]

The Commission has outlined two ways that a Rule 19b-4 filing relating to a bitcoin exchange-traded product can satisfy the concerns outlined in the Winklevoss Order and in particular the concerns regarding potential market manipulation of the underlying market. Bitwise believes these Commission concerns are addressed by demonstrating that:

(1) *Unique Resistance:* The bitcoin market is uniquely resistant to market manipulation and fraudulent activity; and

(2) *Surveillance Sharing:* The listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size in bitcoin or derivatives on bitcoin.

Historically, the existence of a surveilled market has been the primary consideration regarding addressing potential market manipulation, as the Commission stated when discussing its past approval of gold bullion exchange-traded products (''ETPs'') in the Winklevoss Order.[18]

The Sponsor believes that the gold market is substantially similar to the bitcoin market in all respects that are critically important from the perspective of the federal securities laws. That is, the bitcoin market (and the Trust specifically) is uniquely resistant to manipulation, and there is a significant, regulated and surveilled market for bitcoin futures.

The ''Real'' Market for Bitcoin

The Sponsor represents that bitcoin is a globally fungible commodity with low transaction costs, near-zero transportation costs that allows nearly instantaneous transportation to any location around the world, and low-to-zero storage costs, as follows:

- *Globally Fungible Commodity:* A bitcoin is the same anywhere around the world. Unlike wheat, oil or gold, there

[15] *See* Bitwise Asset Management, Presentation to the U.S. Securities and Exchange Commission, dated March 19, 2019, attached to Memorandum from the Division of Trading and Markets regarding a March 19, 2019 meeting with representatives of Bitwise Asset Management, Inc., NYSE Arca, Inc., and Vedder Price P.C., available at *https://www.sec.gov/comments/sr-nysearca-2019-01/srnysearca201901-5164833-183434.pdf.* This document is referred to in this filing as the ''Bitwise Study.''

[16] *See* Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR–BatsBZX–2016–30) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change to List and Trade Shares of the Winklevoss Bitcoin Trust).

[17] *See* letter dated January 18, 2018 from Dalia Blass, Director, Division of Investment Management, Commission, to Paul Schott Stevens, President & CEO Investment Company Institute and Timothy W. Cameron, Asset Management Group—Head, Securities Industry and Financial Markets Association.

[18] *See* Winklevoss Order at note 216 and accompanying text.

are no varieties, purities, or geographically specific delivery locations for bitcoin.

• *Low Transaction Costs:* The median spread for bitcoin traded on Coinbase Pro, a leading bitcoin exchange, in the month of March 2019 was $0.01, with each bitcoin valued at approximately $5,000. This makes bitcoin one of the most tightly quoted financial instruments in the world.

• *Near-Zero Transportation Costs:* Unlike physical commodities, there is virtually no cost to transport bitcoin anywhere in the world, and that transportation can occur nearly instantly.

• *Low-To-Zero Storage Costs:* Bitcoin can safely be stored with established, regulated third-party custodians at a cost that ranges from 0% to 1.5% a year.

These four factors would, in isolation, suggest that the bitcoin market should be uniquely orderly and efficient, with tight spreads and nearly perfect arbitrage between prices on different exchanges. Unfortunately, in practice, many perceive that the market for bitcoin as disorderly and inefficient, with many unregulated operators running crypto ''exchanges'' from unknown domiciles.

Bitwise believes that this perception derives from the fact that leading data aggregators, including those cited by national media organizations like *The New York Times, The Wall Street Journal* and *Barron's,* have reported volume, price and trading data for bitcoin that includes an overwhelming percentage of volume that is fake and/or non-economic in nature. As discussed further below, Bitwise's research concludes that when fake and/or non-economic data is removed, the remaining or ''real'' market for bitcoin is significantly smaller, more orderly and more regulated than commonly understood, and that, with that understanding, this filing should squarely address the concerns laid out by the Commission in the Winklevoss Order.

Bitwise's Analysis of the Reported Market for Bitcoin Trading

Bitwise conducted a thorough, data-driven analysis of the spot market for bitcoin from March 4, 2019 through March 8, 2019.[19] Bitwise analyzed all exchanges reporting more than $1 million in average daily trading volume for bitcoin-fiat and bitcoin-stablecoin pairs to the popular data aggregator CoinMarketCap.com, which yielded 81 exchanges with approximately $6 billion in average daily volume. Bitwise deliberately utilized a short time period to both showcase that fake volume is a current problem impacting the bitcoin market and because, in its experience, exchanges change the algorithms driving how they fake volume over time, which obscures the results of certain data-driven analyses over longer periods.

The Bitwise Study analyzed all purportedly significant bitcoin exchanges and initially found several widespread, superficial indicators of fake or non-economic trading volume. These indicators include the following.

• *Perfectly paired buy and sell orders.* Bitwise does not believe that actual trading on exchanges generally result in perfectly-consistent alternating buy and sell orders of roughly equal size, but nonetheless exchanges exhibited this pattern in their data.

• *Spread sizes.* Bitwise does not believe that there ought to be relatively large reported spreads between bid and ask prices exhibited on exchanges that report a large volume of trades in comparison to other bitcoin exchanges with lower reported volume, absent clear economic explanations (tick size, fees, etc.), but exchanges with large amounts of claimed volume showed spreads that were 100X, 1000X or more the size of spreads on certain exchanges with much lower levels of volume.

• *Real-World Footprint.* Bitwise does not believe that exchanges with large reported amounts of volume would typically exhibit relatively small real-world footprints, including low web traffic, few known employees, minimal social media presence and limited or no fundraising or capitalization information, but it found many exchanges that exhibited these characteristics.

• *Unexplained periods of no trading.* Bitwise found that certain exchanges with large reported volume nonetheless exhibited multiple hours and days with zero volume that are not correlated with business hours, volatility, up time, or other factors.

• *Monotonic trading volume.* Bitwise found that some exchanges reported relatively large amounts of volume in which a roughly identical volume is reported every hour of every day, regardless of price movements, news, waking hours, weekends, or other real-world factors.

Given these indications, Bitwise created a computer program for collecting or ''scraping'' data across different bitcoin exchanges, which collected and stored both the order book and recent trades for all exchanges reporting significant volume, four times each second. Bitwise analyzed data from these 81 different bitcoin exchanges and concluded, for reasons outlined below, that 95% of heretofore reported volume is either fake or non-economic trading. Bitwise estimates that the real total average daily bitcoin volume is approximately $273 million, and that this volume is more regulated, more U.S.-focused and more orderly than perceived.

In separating exchanges that have real vs. non-economic transactions, Bitwise considered the following data characteristics:

▪ *Trade Size Histograms.* Bitwise's computer program can produce trade size ''histograms'' that show the percentage of volume that occur at particular trade sizes over a specified period. Trade size histograms for the exchanges that pass all of its data tests show consistent patterns that reflect trading that Bitwise believes naturally occurs. Such patterns include volume declining as trade size increases and a greater-than-random distribution of volume at whole bitcoin sizes. These patterns are roughly consistent in size and shape across all ten exchanges that pass all of Bitwise's data tests. Trade size histograms from other exchanges, on the other hand, reflect patterns that were idiosyncratic and often had patterns that were transparently programmatic, such as bell curve-like distributions with no apparent reason for such a clustering of trade sizes, and increasing volume for larger trade sizes rather than the decaying trend mentioned above. Most of these exchanges showed no peaks at whole bitcoin sizes.

• *Volume Spike Analysis.* Bitwise's computer program can produce charts that show volume ''spikes,'' or periods of significantly increased transaction volume, across any exchange. Because the bitcoin market is a globally integrated market for a fungible good, Bitwise believed a priori that, with some limitations for time zones and holidays, volume on different exchanges would rise and fall concurrently in response to the same events or changes in market conditions.

• This pattern played out as expected among the ten exchanges that passed all data tests and that Bitwise believes constitutes substantially all of the real global spot trading volume for bitcoin, but was noticeably absent among other exchanges, which either had no discernible volume spikes or had patterns that were wholly idiosyncratic and did not repeat on other exchanges.

▪ *Spread Patterning Analysis.* The spread on an exchange with real volume will have two key features that Bitwise

[19] *See* note 15, *supra.*

believes it can identify through a data driven analysis.

• First, Bitwise believes there should be a generally rational relationship between the volume on the exchange and the size of the spread (subject to limitations put in place at the exchange level, including the tick size and any exchange-level fees). In other words, exchanges with high volume should generally have smaller spreads than exchanges with low volume, and in a globally integrated market for a fungible good, those spreads should be competitive with other exchanges. Investors may tolerate a marginally higher spread on a particular exchange due to levels of comfort, design, user experience, regulatory status or other factors, but they are unlikely to trade significantly on exchanges with spreads that are many multiples larger than other available exchanges. In analyzing the data, Bitwise found many exchanges reporting very high levels of volume that nonetheless reported average spreads that were 1,000%-35,000% higher than the spreads reported on other well-established, regulated and well-capitalized exchanges that passed all of Bitwise's data tests.

• Second, as with volume, spreads change over time in reaction to market developments. Bitwise found that many exchanges exhibited spread patterns over time that revealed artificial, programmatic drivers, including spreads that unnaturally anchor on arbitrary high dollar levels (*i.e.,* Bitwise found examples of exchanges with spreads that would consistently base at a random dollar value (for example, $10), and sometimes would change that resting mode spread in a step function (for example, going from a $10 mode spread over multiple days to a $7.50 mode spread over multiple days without a rational explanation owing to fees or other factors).

As a result of its research, Bitwise believes that, as of March 8, 2019, as stated earlier, the real daily spot volume of the bitcoin market is approximately $273 million, and not the $6 billion that is commonly reported. It further believes that this volume is spread across ten exchanges that are located or domiciled in developed markets.

Bitwise believes that this finding is significant and that it leads to the following key conclusions:

• The smaller trade volume is more aligned with *a priori* expectations for bitcoin turnover, and is still sufficiently robust to support liquidity in the Trust, as discussed below.

• The real market for bitcoin appears to be orderly and efficient, with effective arbitrage in place and robust price discovery shared across multiple exchanges, as discussed below.

• The regulated and surveilled bitcoin futures market is much larger in comparison to the spot bitcoin market than is commonly understood, with significant implications, as discussed below.

The Real Market for Bitcoin Is Extremely Efficient, Well-Arbitraged and More Regulated Than Commonly Understood

As described above, Bitwise found that just ten exchanges passed all of its data tests. It believes that these ten exchanges represent substantially all of the real global spot market for bitcoin, and notes that these exchanges are more established, more likely to be located in developed markets, more regulated, and more likely to have sophisticated market surveillance tools in place than the broader set of exchanges reporting significant volume. Whereas most of the broader set of analyzed exchanges have no known domicile, all ten of the exchanges that passed Bitwise's data tests are domiciled or based in developed markets, including the U.S., the UK, Malta and Japan. Nine of the ten exchanges are regulated by the U.S. Department of Treasury's FinCEN division as Money Services Businesses, and six have a BitLicense from the New York State Department of Financial Services.[20] Finally, five of the ten exchanges have either robust internal (one) or robust third-party (four) market surveillance tools in place to monitor, report and correct for abusive trading behavior.[21]

Bitwise acknowledges that the regulatory status of these exchange platforms is not co-extensive to the obligations of and oversight for national securities exchanges or futures exchanges, but notes that these platforms are required to comply with particular obligations and types of regulatory compliance that provide business oversight and regulatory compliance requirements.

For instance, the nine exchanges that are regulated by the U.S Department of Treasury's FinCEN division as Money Services Businesses are charged with various responsibilities including:[22]

• Identifying people with ownership stakes or controlling roles in the MSB;

• Establishing a formal Anti-Money Laundering (AML) policy in place with documentation, training, independent review, and a named compliance officer;

• Having strict customer identification and verification policies and procedures;

• Filing Suspicious Activity Reports (SARs) for suspicious customer transactions;

• Filing Currency Transaction Reports (CTRs) for cash-in or cash-out transactions greater than $10,000; and

• Maintaining a five-year record of currency exchanges greater than $1,000 and money transfers greater than $3,000.

The six exchanges that are regulated by the New York State Department of Financial Services (''NYDFS'') under the BitLicense program have additional obligations, including the following:[23]

• Submission of audited financial statements including income statements, statement of assets/liabilities, insurance, and banking.

• Capitalization requirements set at NYDFS's discretion.

• Full reserves of custodian assets selling/encumbering prohibited.

• Fingerprints and photographs of employees with access to customer funds.

• Qualified Chief Information Security Officer and annual penetration testing/audits.

• Documented business continuity and disaster recovery plan, independently tested annually.

• Independent exam by NYDFS.

• Implementing measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation, and to monitor, control, investigate and report back to the New York State Department of Financial Services any wrongdoing.[24]

An Efficient, Well-Arbitraged Market

The Sponsor believes that, while the bitcoin market is commonly perceived to be disorderly and inefficient, when focused only on the ten exchanges

[20] *See* Exhibit 3 [to Amendment No. 1], Item 1. As of April 26, 2019, Bitfinex was removed by the Bitwise Crypto Index Committee from the exchanges contributing prices to deriving the Bitwise Daily Bitcoin Reference Price pursuant to the New York Attorney General's claims towards iFinex Inc., operator of Bitfinex. As a result, the exchanges contributing to the Reference Price was reduced from ten to nine.

[21] *See* Exhibit 3 [to Amendment No. 1], Item 2.

[22] *See* BSA Requirements for MSBs, FinCEN website: *https://www.fincen.gov/bsa-requirements-msbs.*

[23] *See* ''New York's Final ''BitLicense'' Rule: Overview and Changes from July 2014 Proposal,'' June 5, 2015, Davis Polk, available at *https://www.davispolk.com/files/new_yorks_final_bitlicense_rule_overview_changes_july_2014_proposal.pdf.*

[24] *See* ''DFS Takes Action to Deter Fraud and Manipulation in Virtual Currency Markets,'' available at *https://www.dfs.ny.gov/about/press/pr1802071.htm.*

referenced above, which it believes represent substantially all of the real spot trading volume in bitcoin, the bitcoin market is shown to be extraordinarily efficient, well-arbitraged, resilient and robust.

Bitwise notes that, from January 1, 2018, through March 17, 2019, the price of bitcoin on each of the ten exchanges has traded almost perfectly in-line.[25]

The Bitwise Study further showed that the average deviation from the aggregate price from the ten exchanges ranged from 0.13% to 0.25% over this time period. It noted that this average deviation is well within the expected arbitrage band between these exchanges; many of these exchanges charge fees of up to 0.30% for trading, and one cannot expect average deviations below these exchanges to be arbitraged away.[26]

In addition, the Bitwise Study showed that the existence of sustained deviations—defined as differences in price greater than 1% that lasted for more than 100 seconds—were extremely rare over the time period studied. In the histogram attached as Exhibit 3 [to Amendment No. 1], each sustained deviation is marked as a thin white line.[27]

In sum, Bitwise believes that the Bitwise Study shows that the real market for bitcoin is extremely efficient and that arbitrage exists between and among the ten exchanges with real volume.

Bitwise further believes, as discussed above, that the efficiency of the market has improved dramatically over the past eighteen months. Bitwise further believes that the market is approaching the practical limit of these improvements, in that prices among different exchanges are nearly perfectly arbitraged, spreads are incredibly tight, and the market is liquid on a twenty four hour/seven day a week basis.

Protections Against Market Manipulation Specific to the Trust's Design

Bitwise believes that the specific design of the Trust's NAV calculation process, as described below, its exclusive use of in-kind creation/redemptions, and its decision to accrue all fees in bitcoin support its efforts to meet the concerns set forth in the Winklevoss Order.

Net Asset Value

According to the Registration Statement, the Trust's per Share NAV will be calculated by dividing the value of the net assets of the Trust (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares outstanding. The Trust's NAV will be calculated on each trading day on the Exchange. The Trust will compute its NAV as of 4:00 p.m. E.T. The Trust's NAV will be calculated only once each trading day. The Trust's daily NAV may be found at the Trust's website.

In calculating the NAV, the Trust relies on the Bitwise Daily Bitcoin Reference Price, which is produced once per day at 4:00 p.m. E.T. using the methodology outlined below.

First, Bitwise tracks a universe of over 200 on-line cryptocurrency exchanges that purport to offer trading on bitcoin and other cryptocurrencies. Bitwise eliminates a significant portion of the exchanges based on a number of factors. Those factors include, but are not limited to:

- Eliminating exchanges that are domiciled in emerging market countries;
- Eliminating exchanges domiciled in countries that have capital controls;
- Eliminating exchanges that lack functioning and stable Application Programing Interfaces (''API'') for the transmission of price and volume data;
- Eliminating exchanges which, in the judgment of Bitwise, have issues with significant downtime, problems with customers withdrawal abilities, or known security issues;
- Eliminating exchanges which, in the judgement of Bitwise, are or may be subject to extraordinary legal or regulatory activity; and
- Eliminating exchanges that do not have at least $1 million in average daily trading volume for bitcoin-fiat or bitcoin-stablecoin trading pairs over the past calendar quarter.[28]

In addition, on no less than a quarterly basis, the Bitwise Crypto Index Committee (the ''Committee'') reviews the actual published trading data of all exchanges that pass the above-mentioned screens. This further analysis includes bid/ask spreads, actual claimed executed trades with price and volume, and any other factors the Committee deems relevant. Exchanges that show persistent signs of artificial or inflated volume may be removed from the list of exchanges contributing prices to the Bitwise Daily Bitcoin Reference Price and the Bitwise Real-Time Bitcoin Price (the Bitwise Daily Bitcoin Reference Price, or ''Bitcoin Price,'' is published once daily based on the procedures described herein and used for NAV calculation purposes, while the ''Bitwise Real-Time Bitcoin Price'' is published continuously for indicative purposes).

As a result of this screening process, Bitwise's list of exchanges currently used to price the Bitwise Daily Bitcoin Reference Price narrows from over 200 considered exchanges down to ten.[29] Bitwise believes that these exchanges currently account for substantially all of the real, spot global volume of bitcoin traded on exchanges with economic intent, excluding capital-controlled countries, although both the number of exchanges and the percentage of global volume they represent is subject to change over time.

The Bitwise Daily Bitcoin Reference Price relies on the prices and volume reported on these ten exchanges. To calculate the price, Bitwise examines six five-minute periods leading up to 4:00 p.m. E.T. It then calculates an equal-weighted average of the volume-weighted median price of these six five-minute periods.[30]

The Sponsor believes these procedures are designed to protect the Bitwise Daily Bitcoin Reference Price and therefore the Trust's NAV from potential attempts at manipulation. Specifically, the Sponsor believes that using six consecutive five-minute segments over a thirty-minute period means malicious actors would need to sustain efforts to manipulate the market over an extended period of time, or would need to replicate efforts multiple times, potentially triggering review by exchange trading platforms, market participants, and regulators.

In addition, the use of a median price eliminates the ability of outlier prices to impact the NAV, as it systematically excludes those prices from the NAV calculation.[31]

The use of a volume-weighted median (as opposed to a traditional median) protects against attempts to manipulate the NAV by executing a large number of low-dollar trades, because, any manipulation attempt would have to involve a majority of global spot bitcoin volume in a five-minute window to have any influence on the NAV.[32]

The use of ten exchanges [33] representing substantially all of the real global spot volume for bitcoin also mitigates against idiosyncratic exchange risk, as the failure of any individual

[25] *See* Exhibit 3 [to Amendment No. 1], Item 3.

[26] *See* Exhibit 3 [to Amendment No. 1], Item 4.

[27] *See* Exhibit 3 [to Amendment No. 1], Item 5.

[28] The volume requirement described in the last bullet in the list above may be waived by Bitwise Index Services for otherwise qualified exchanges if they are in fact being currently used to price publicly-listed cryptocurrency investment products such as futures contracts, non-U.S. exchange-traded funds and non-U.S. exchange-traded notes.

[29] *See* note 20, *supra.*

[30] *See* Exhibit 3 [to Amendment No. 1], Item 6.

[31] *See* Exhibit 3 [to Amendment No. 1], Item 7.

[32] *See* Exhibit 3 [to Amendment No. 1], Item 8.

[33] *See* note 20, *supra.*

exchange will not materially impact pricing for the Trust. It also allows the Administrator to calculate the NAV in a manner that significantly deters manipulation. The fact that there are multiple exchanges contributing prices to the NAV also makes manipulation more difficult in a well-arbitraged and fractured market, as a malicious actor would need to manipulate multiple exchanges simultaneously or dramatically skew the historical distribution of volume between the various exchanges in order to impact the NAV. Capturing substantially all of the spot trading in bitcoin further increases the difficulty, since significantly more capital would be required in any attempt to influence the NAV and attempts to profit from that manipulation would be difficult.

Bitwise notes that the methodology for the Bitwise Daily Bitcoin Reference Price is similar in many respects to the CME CF Bitcoin Reference Rate, which is the rate at which the CME bitcoin futures settle.[34]

Indicative Fund Value

In order to provide updated information relating to the Trust for use by investors, market professionals and other market data vendors, the Exchange will calculate an updated ''Intraday Indicative Value'' (''IIV''). The IIV will be calculated by using the prior day's closing net assets of the Trust as a base and updated throughout the Exchange's Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect changes in the most recently reported price level of the Bitwise Real-Time Bitcoin Price, as reported by Bloomberg, L.P. or another reporting service.

As stated, the Bitwise Real-Time Bitcoin Price is calculated from the same exchanges as the Bitwise Daily Bitcoin Reference Rate, and also uses a volume-weighted median price methodology. Instead of equally weighting prices captured over six five-minute periods, however, the Bitwise Real-Time Bitcoin Price uses only the last trade on each exchange, and uses the trailing 30-minute volume on those exchanges as the weighting factor.

The IIV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and will be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session.

Creation and Redemption of Shares

According to the Registration Statement, the Trust intends to create and redeem Shares in one or more Creation Baskets. A Creation Basket is a block of 25,000 Shares of the Trust. Except when aggregated in Creation Units, the Shares are not redeemable securities.

Only Authorized Participants may purchase and redeem Creation Baskets. Authorized Participants must be (1) registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions described below, and (2) the Depository Trust Company (''DTC'') Participants. An Authorized Participant is an entity that has entered into an Authorized Participant Agreement with the Trust and the Sponsor.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Marketing Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a ''business day'' means any day other than a day when the Exchange or the New York Stock Exchange is closed for regular trading.

All creation baskets are processed in-kind. By placing a purchase order, an Authorized Participant agrees to deposit bitcoin with the Trust. Prior to the delivery of baskets for a purchase order, the Authorized Participant must also have wired to the custodian the nonrefundable transaction fee due for the purchase order. Authorized Participants may not withdraw a creation request. If an Authorized Participant fails to consummate the foregoing, the order shall be cancelled.

Redemption Procedures

According to the Registration Statement, the procedures by which an Authorized Participant can redeem one or more baskets mirror the procedures for the creation of creation baskets. On any business day, an Authorized Participant may place an order with the Marketing Agent to redeem one or more baskets. A redemption order so received will be effective on the date it is received in satisfactory form by the Marketing Agent (''Redemption Order Date''). The redemption procedures allow Authorized Participants to redeem baskets and do not entitle an individual shareholder to redeem any shares in an amount less than a Creation Basket, or to redeem baskets other than through an Authorized Participant.

By placing a redemption order, an Authorized Participant agrees to deliver the baskets to be redeemed through DTC's book-entry system to the Trust not later than noon E.T. on the second business day following the effective date of the redemption order. Prior to the delivery of the redemption distribution for a redemption order, the Authorized Participant must also have wired to the Sponsor's account at the custodian the non-refundable transaction fee due for the redemption order. An Authorized Participant may not withdraw a redemption order.

All redemption orders are processed in-kind. By placing a redemption order, an Authorized Participant agrees to receive bitcoin.

The manner by which redemptions are made is dictated by the terms of the Authorized Participant Agreement. If an Authorized Participant fails to consummate the foregoing, the order shall be cancelled.

Determination of Redemption Distribution

The redemption distribution from the Trust will consist of a transfer to the redeeming Authorized Participant of an amount of bitcoin that is in the same proportion to the total assets of the Trust (net of estimated accrued but unpaid fees, expenses and other liabilities) on the date the order to redeem is properly received as the number of shares to be redeemed under the redemption order is in proportion to the total number of shares outstanding on the date the order is received. The Sponsor, directly or in consultation with the Administrator, determines the requirements for bitcoin that may be included in distributions to redeem baskets. The Marketing Agent will publish an estimate of the redemption distribution per basket as of the beginning of each business day.

Fee Accrual

The Sponsor proposes to accrue all fees in bitcoin.

The Impact of the Exclusive Use of In-Kind Creations, Redemptions and Fee Accruals

Bitwise believes that the exclusive use of in-kind creations, redemptions and fee accruals, in all situations except when the Trust is required to liquidate, provides long-term investors in the Trust with significant, redundant and strong protection against attempts to manipulate the price of bitcoin in such a way as to impact the Bitwise Daily

[34] Bitwise notes that a detailed analysis on how a volume-weighted median pricing approach both theoretically and empirically protects against potential manipulation is available in the paper ''Analysis of the CME CF Bitcoin Reference Rate and CME CF Bitcoin Real Time Index'' by Andrew Paine and William J. Knottenbelt of the Imperial College Centre for Cryptocurrency Research and Engineering, November 14, 2016.

Bitcoin Reference Rate and therefore the NAV of the Trust.

That is because, while Bitwise believes that the NAV will accurately reflect the globally integrated price for bitcoin, and that that price is uniquely resistant to market manipulation, and acknowledges that this is important, it gains additional comfort that long-term investors in the Trust are protected from short-term attempts to manipulate that NAV by the Trust's exclusive use of in-kind creations, redemptions and fee accruals, because denominating those transactions exclusively in bitcoin ensures that the Trust maintains the appropriate amount of bitcoin-per-Share in all scenarios, even if the NAV or the Bitwise Daily Bitcoin Reference Price were somehow to be manipulated.

How The Trust Meets Standards in the Winklevoss Order

The preceding information, both about the real nature of the bitcoin market and the structure of the Trust, informs the means by which Bitwise believes that the Trust meets the concerns and conditions set forth in the Winklevoss Order.

Regarding the first condition—namely, showing that the bitcoin market is uniquely resistant to manipulation—Bitwise believes that the digital nature of bitcoin makes it unique compared to other commodities in three important ways, which combine to provide unique protections against attempts to manipulate the market:

1. *Fungibility:* As mentioned, unlike other commodities (like oil, wheat or even gold), as mentioned, there are no varieties, purities or geographical delivery locations for a bitcoin.

2. *Transportability:* Bitcoin has no physical manifestation. As a result, it can be instantly transported from one location to another, anywhere in the world, at a cost approaching zero.

3. *Exchange Tradability:* Most commodities trade over-the-counter or rely on representative, derivative futures contracts because they lack the characteristics listed above. Bitcoin is unique in that the commodity itself trades directly on exchange, allowing for open price discovery.

These unique features allow the bitcoin market to be uniquely resistant to market manipulation in critical ways.

For example, Bitiwse [sic] believes that the fact that bitcoin's price is set on the open market makes it uniquely resistant to manipulation compared to other commodities whose price is set by coordinated fix pricing. The Bitwise Study notes that many of the largest recent market manipulation scandals have been driven by coordinated fix pricing, including those related to London Interbank Offered Rate (LIBOR) (2012), Global Forex (2013), Gold Fix (2014), and the Australian Bank Bill Swap Rate (ASIC) (2016), among others. Bitwise believes that the fact that the bitcoin market engages in price discovery in an open, transparent and online setting introduces certain risks that must be considered and controlled through the careful design of the Trust, but notes that these risks can be weighed against the benefits that accrue to the public, transparent and open nature of that price discovery.

The Bitwise Study and related research also show that the fact that bitcoin uniquely has no physical delivery location renders it immune to another common form of attempted and successful commodity market manipulation. For instance, in May 2011, the U.S. Commodity Futures Trading Commission filed suit against three American and international trading firms for attempting to manipulate the price of oil by cornering or partially cornering the market for oil storage in Cushing, Oklahoma.[35] Cushing is the delivery point for the popular NYMEX WTI Crude Oil futures contract, the most liquid crude oil futures contract in the world, which is widely seen as the benchmark price for WTI crude oil in the U.S. While the price of the WTI contract is used as a proxy for the price of all WTI crude, just 5%–10% of U.S. crude oil storage is available in Cushing. This disconnect between the size of the storage market for the reference price contract and the much larger real market for WTI crude oil creates an opportunity for individuals and firms to attempt to profit from artificially manipulating the relatively small market for crude oil storage while holding broader positions in the underlying physical commodity. Because bitcoin itself trades on exchanges and does so at a globally integrated price, these types of attempts at market manipulation are not possible, because there is no narrowly constructed representative price with a physical storage limitation that can be manipulated.

Other factors further contribute to the unique resistance to market manipulation that exists in the bitcoin market. For instance, as described above, the fact that bitcoin is fungible and transportable means that bitcoin trades at a single price on real exchanges around the world, and that extremely effective arbitrage is in place between those exchanges. Because there is a single global price for bitcoin, any attempt to manipulate the market must involve a non-trivial amount of the total global liquidity, which makes it more difficult to achieve and significantly more risky to attempt.

In addition, the fact that bitcoin itself (and not some derivative of it) is traded on exchanges means profiting from any such market manipulation would be difficult. The Trust's NAV captures substantially all of the spot bitcoin trading volume in the world, and the Trust's NAV is designed in a volume-weighted way, meaning attempts to manipulate must involve a majority of trading volume over a significant period of time.

Further, Bitwise believes that the fact that bitcoin is fungible and transportable has allowed a distributed market to emerge, which provides unique resistance to market manipulation given the factors identified above. Bitwise's research notes that no single exchange represents the majority of real trading volume on the bitcoin market, and that volume is spread amongst ten different exchanges. This contributes to bitcoin's unique resistance to market manipulation, as any attempt to manipulate the market must either be coordinated synchronously across multiple exchanges or must involve a significant spike of volume on a single exchange (an action that would trigger review in the Trust's NAV process). Bitwise notes that there is a carefully designed lag between the strike time of the NAV (4:00 p.m. E.T.) and the time that the NAV is distributed (approximately 5:30 p.m. E.T.), which allows time for Bitwise Index Services to review contributed prices in both an algorithmic and manual way to ensure that no anomalous behavior exists.

Bitwise further believes that the unique design of the Bitwise Daily Bitcoin Reference Rate, and, therefore, the NAV—as well as the Trust's exclusive use of in-kind creations and redemptions, and its decision to accrue all fees in bitcoin—provide additional unique resistance to any short-term attempts at market manipulation for the reasons described above.

A Significant, Regulated and Surveilled Market Exists and Is Closely Connected With Spot Market for Bitcoin

In the Winklevoss Order, the Commission laid out both the need for and the definition of a surveilled market of significant size. Specifically, the Commission explained that:

[35] *See* ''U.S. Suit Sees Manipulation of Oil Trades'' by Graham Bowley, May 24, 2011, *The New York Times,* available at *https://www.nytimes.com/2011/05/25/business/global/25oil.html?ref=todayspaper.*

[for the] commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.[36]

Further, the Commission stated that the Commission interprets terms ''significant market'' and ''market of significant size'' to include:

a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[37]

Bitwise believes that, in light of a better understanding of the true size of the spot bitcoin market, the combined CME/CFE futures market represents a large, surveilled and regulated market, as required above. Over the time period covered in the Bitcoin Study, the average daily volume of the bitcoin futures market was $91 million. While this appears tiny in relation to the reported volume of $6 billion, it is meaningful in relation to the actual volume of $273 million.[38]

In addition, the CME futures market is larger than all but one spot bitcoin exchange and nearly as large as the largest bitcoin exchange.[39]

The Bitwise Study found that the prices on the CME and CFE futures markets are closely aligned with the Bitwise Daily Bitcoin Reference Price on a once-a-day basis, and with the Bitwise Real-Time Bitcoin Price on an intraday basis. This follows logically, given that the CME futures settlement price is based on prices pulled from four of the ten exchanges that contribute to the Bitwise Daily Bitcoin Reference Price and the Bitwise Real-Time Bitcoin Rate, and the CFE futures settlement price is based on prices pulled from one of the ten exchanges that contribute to the Bitwise Daily Bitcoin Reference Price and the Bitwise Real-Time Bitcoin Rate. The tightness-of-fit between the two prices is limited by the term structure of the futures contract and the asymmetric cost of hedging a futures position—it is less expensive to hedge a short position in bitcoin futures than it is to hedge a long position in bitcoin futures. Nonetheless, the connection between the two prices is strong and arbitrage exists between the two prices.

Given the significant size of the CME and CFE futures markets (or the CME futures market in isolation), and the close relationship in prices between the derivatives market and the spot market, there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the Exchange's ability to obtain information regarding trading in the Shares and futures from markets and other entities that are members of the Intermarket Trading Group (''ISG''), which includes the CME and CFE, would assist the ETP listing market in detecting and deterring misconduct.

Impact on the Spot Market for Bitcoin

In the Winklevoss Order, the Commission noted that it wanted to see a market where ''it is unlikely that trading in the ETP would be the predominant influence on prices in that market''.[40] While future inflows to the proposed Trust cannot be predicted, to provide comparable data, Bitwise examined total net inflows in the first year of existence for two types of ETPs: Commodity ETPs that were first to market in the U.S. and blockchain ETFs. Bitwise found that one year net inflows ranged from $2 million to approximately $3 billion for the ETPs meeting that definition.[41]

Given the size of these inflows versus the size of the real bitcoin market ($273 million in average daily volume), Bitwise believes that it is unlikely that trading in the ETP would become the predominant influence on prices in that market.

Conclusion Regarding Standards in the Winklevoss Order

In summary, the Commission articulated two ways that a proposed bitcoin ETP could meet the standards set forth in the Winklevoss Order. The Commission explained that the proposed ETP must show either that the underlying market for bitcoin is uniquely resistant to market manipulation, and/or that a surveilled derivatives market of significant size existed alongside that market. Bitwise believes that the information presented above attempts to address those concerns, showing both the ways in which the bitcoin market (as the first digital commodity) is uniquely resistant to market manipulation, and that the CME and CFE are large, surveilled and regulated markets that fulfill the requirements for surveillance sharing. Bitwise further believes that the careful construction of the Bitwise Daily Bitcoin Reference Price (and the Bitwise Real-Time Bitcoin Price), and thereby the NAV (and IIV), the decision to process all creations and redemptions in-kind, and the decision to accrue all fees in-kind, provide additional protections against attempts to manipulate the spot market for bitcoin.

Availability of Information Regarding Bitcoin

The NAV for the Trust's Shares will be disseminated daily to all market participants at the same time.

Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IIV will be available through online information services.

In addition, the Trust's website will display the applicable end of day closing NAV. The daily holdings of the Trust will be available on the Trust's website before 9:30 a.m. E.T. The Trust's total portfolio composition will be disclosed each business day that NYSE Arca is open for trading, on the Trust's website. The Trust's website will also include a form of the prospectus for the Trust that may be downloaded. The website will include the Shares' ticker and CUSIP information, along with additional quantitative information updated on a daily basis for the Trust. The Trust's website will include (1) the prior business day's trading volume, the prior business day's reported NAV and closing price, and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation (''Bid/Ask Price'') against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The Trust's website will be publicly available prior to the public offering of Shares and accessible at no charge.

The spot price of bitcoin as reflected in the Bitwise Daily Bitcoin Reference Price will also be available on a 24-hour basis from the Trust's website.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant

[36] Winklevoss Order at note 209 and accompanying text.

[37] Winklevoss Order, 83 FR at 37594.

[38] *See* Exhibit 3 [to Amendment No. 1], Item 9.

[39] *See* Exhibit 3 [to Amendment No. 1], Item 10.

[40] *See* Winklevoss Order, 83 FR at 37594.

[41] *See* Exhibit 3 [to Amendment No. 1], Item 11.

factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.[42] Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IIV occurs.[43] If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Further, NYSE Arca Rule 8.201–E sets forth certain restrictions on Equity Trading Permit Holders acting as registered Market Makers in the Shares to facilitate surveillance. Under NYSE Arca Rule 8.201–E(g), an Equity Trading Permit Holder acting as a registered Market Maker in the Shares is required to provide the Exchange with information relating to its trading in the underlying commodity, related futures or options on futures, or any other related derivatives. Commentary .04 of NYSE Arca Rule 11.3–E requires an Equity Trading Permit Holder acting as a registered Market Maker, and its affiliates, in the Shares to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).

As a general matter, the Exchange has regulatory jurisdiction over its Equity Trading Permit Holders and their associated persons, which include any person or entity controlling an Equity Trading Permit Holder. A subsidiary or affiliate of an Equity Trading Permit Holder that does business only in commodities or futures contracts would not be subject to Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[44] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and bitcoin futures with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and bitcoin futures from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG (including the CME and CFE) or with which the Exchange has in place a comprehensive surveillance sharing agreement (''CSSA'').[45]

Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying bitcoin through ETP Holders acting as registered ''Market Makers'', in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolios of the Trust or the Bitwise Daily Bitcoin Reference Price, (b) limitations on portfolio holdings, reference assets or the Bitwise Daily Bitcoin Reference Price, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Early and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Units

[42] *See* NYSE Arca Rule 7.12–E.

[43] A limit up/limit down condition in the futures market would not be considered an interruption requiring the Trust to be halted.

[44] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[45] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

(and that Shares are not individually redeemable); (3) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the IIV is disseminated; (5) how information regarding portfolio holdings is disseminated; (6) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (7) trading information; and (8) NYSE Arca suitability rules.

The Information Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses described in the Registration Statement.

The Information Bulletin will also disclose the trading hours of the Shares that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day. The Information Bulletin will disclose that information about the Shares will be publicly available on the Trust's website.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[46] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. As discussed above, bitcoin trades in a well-arbitraged and distributed market that is significantly smaller, more orderly, and more regulated than commonly reported. As a result, as discussed above, any attempts at manipulation must involve a large share of global bitcoin volume, which would be substantially difficult to achieve. Accordingly, the notional size of the regulated, surveilled CME and CFE bitcoin futures markets (or even the CME market in isolation) is larger than all but one of the ten spot bitcoin exchanges, and is nearly as big as the largest exchange. In addition, prices on the CME and CFE futures markets are closely related to prices on the bitcoin spot market, and arbitrage between those prices is well-established. Given the significant size of the CME and CFE futures market, and the close relationship in prices between the derivatives market and the spot market, there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the fact that the CME and CFE are ISG members would assist the Exchange in detecting and deterring misconduct.[47]

The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and bitcoin futures with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and bitcoin futures or the underlying bitcoin through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market.

Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The Trust's website will also include a form of the prospectus for the Trust that may be downloaded. The website will include the Shares' ticker and CUSIP information, along with additional quantitative information updated on a daily basis for the Trust. The Trust's website will include (1) daily trading volume, the prior business day's reported NAV and closing price, and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The Trust's website will be publicly available prior to the public offering of Shares and accessible at no charge.

Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. The Information Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses described in the Registration Statement. The Information Bulletin will also disclose the trading hours of the Shares and that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day. The Information Bulletin will disclose that information about the Shares will be publicly available on the Trust's website.

Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of a new type of exchange-traded product based on the price of bitcoin that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of a new type of Commodity-Based Trust Share based on the price of bitcoin that will enhance competition among market participants, to the benefit of investors and the marketplace.

[46] 15 U.S.C. 78f(b)(5).

[47] *See* note 15, *supra.*

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2019–01 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[48] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[49] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' [50]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[51]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by June 11, 2019. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 25, 2019. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,[52] in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. What are commenters' views on the assertions by the Exchange and the Sponsor that bitcoin is uniquely resistant to manipulation? [53] What are commenters' views on the Sponsor's analysis as described by the Bitwise Presentation, and by the Exchange in Amendment No. 1, including the factual basis for the assertions made and the selection of the trading periods analyzed?

2. What are commenters' views on the assertions by the Exchange and the Sponsor regarding the nature of the market for bitcoin, including the efficiency of that market, the susceptibility of that market to manipulation, and the ways in which that market is, or is not, similar to the markets for other commodities?

3. What are commenters' views on the assertion by the Exchange and the Sponsor that a significant, regulated and surveilled market for bitcoin futures exists and that it is closely connected with the spot market for bitcoin? What are commenters' views on whether there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade in the bitcoin futures market to manipulate the Shares? What are commenters' views on whether it is likely that trading in the Shares would be the predominant influence on prices in the bitcoin futures market?

4. What are commenters' views on the relationship between the bitcoin futures market and the bitcoin spot market? For example, what is the relative size of these markets, and where does bitcoin price formation occur? Does the market, spot or futures, in which price formation occurs affect commenters' analysis of whether it is reasonably likely that someone attempting to manipulate the Shares would be reasonably likely to have to trade in the bitcoin futures market, or that trading in the Shares would be the predominant influence on prices in the bitcoin futures market? To what extent, if at all, do recent developments in the bitcoin futures market—namely, the cessation of new bitcoin futures contract trading on the Chicago Futures Exchange—affect commenters' analysis of these questions?

5. What are commenters' views on whether the Exchange could enter into surveillance-sharing agreements with regulated spot markets of significant size related to bitcoin?

6. What are commenters' views on the Sponsor's assertions that a large percentage of publicly reported spot volume in bitcoin is ''fake'' or ''non-economic in nature''? What are commenters' views on the method by which the Sponsor purports to distinguish ''real'' bitcoin trading volume from ''fake'' bitcoin trading volume? What are commenters' views on the Sponsor's estimate of the average daily ''real'' volume of trading in the bitcoin spot market?

7. What are commenters' views on the Sponsor's assertion that the 10 identified bitcoin trading venues represent ''substantially all of the economically significant bitcoin trading volume in the world (outside of capital-controlled countries)''? What are commenters' views on whether over-the-counter trading in bitcoin is economically significant, and what are commenters' views on the share of bitcoin spot trading that takes place in the over-the-counter market? Does economically significant bitcoin spot trading occur elsewhere?

8. What are commenters' views on the effectiveness of arbitrage among the 10 bitcoin trading venues identified by the Sponsor? What are commenters' views on whether the price of bitcoin on these venues can be affected by activity on other bitcoin trading venues, including other centralized trading venues, the over-the-counter market, or bitcoin derivatives markets? What are commenters' views on the Sponsor's

[48] 15 U.S.C. 78s(b)(2)(B).

[49] *Id.*

[50] 15 U.S.C. 78f(b)(5).

[51] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[52] *See supra* note 6.

[53] The Sponsor made a number of representations to the Commission in a presentation dated March 19, 2019 (''Bitwise Presentation''). *See supra* note 15.

description of the bitcoin market as a ''globally integrated market for a fungible good''?

9. What are commenters' views on the degree to which each of the 10 identified bitcoin trading venues is subject to regulation? What are commenters' views on the extent to which each of these venues can, or does, conduct surveillance of bitcoin trading activity?

10. What are commenters' views on the methodologies by which the Bitwise Daily Bitcoin Reference Price and the Bitwise Real-Time Bitcoin Reference Price are calculated? What are commenters' views on the role of the Bitwise Crypto Index Committee in determining which trading venues will contribute prices to the Bitwise Daily Bitcoin Reference Price and the Bitwise Real-Time Bitcoin Reference Price?

11. What are commenters' views on the use of the Bitwise Daily Bitcoin Reference Price to calculate the net asset value of the Shares? What are commenters' views on the alternative valuation methods proposed by the Sponsor? What are commenters' views on whether any of these pricing mechanisms, primary or alternate, would be affected by, or resistant to, manipulative activity in bitcoin markets?

12. The Exchange represents that, as of April 26, 2019, the Bitwise Crypto Index Committee removed Bitfinex from the list of trading venues that contribute prices to derive the Bitwise Daily Bitcoin Reference Price. The Exchange states that this action was taken ''pursuant to the New York Attorney General's claims towards iFinex Inc., operator of Bitfinex.'' What are commenters' views on whether the removal of Bitfinex—which the Sponsor asserts is a ''real'' trading venue—from the calculation of the Bitwise Daily Bitcoin Reference Price might affect the reliability or accuracy of that price? Does the removal of the Bitfinex venue from the calculation of this reference price because of regulatory or legal activity affect commenters' views of the Sponsor's screening process for bitcoin trading venues or its general distinction between ''real'' and ''fake'' bitcoin trading volume? Does the removal of the Bitfinex venue from the calculation of this reference price affect commenters' views of whether it is appropriate to use the Bitwise Daily Bitcoin Reference Price to calculate the net asset value of the Shares?

13. What are commenters' views on the Sponsor's assertions regarding how bitcoin trading versus Tether compares to or might affect bitcoin pricing more generally? What are commenters' views on whether bitcoin trading versus Tether might affect the calculation of the net asset value of the Shares?

14. What are commenters' views on the Sponsor's assertions that the proposed in-kind creation and redemption mechanism and payment of Trust expenses directly in bitcoin would insulate holders of the Shares from harm resulting from manipulation of the Shares' net asset value?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2019–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2019–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2019–01 and should be submitted by June 11, 2019. Rebuttal comments should be submitted by June 25, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[54]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10351 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, May 23, 2019.

PLACE: The meeting will be held at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matters of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; Resolution of litigation claims; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

[54] 17 CFR 200.30–3(a)(12) & 17 CFR 200.30–3(a)(57).

Dated: May 16, 2019.

Vanessa A. Countryman,

Acting Secretary.

[FR Doc. 2019–10649 Filed 5–17–19; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85868; File No. SR–CboeBZX–2019–034]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Allow the Main Sector Rotation ETF, a Series of the Northern Lights Fund Trust IV, To Hold Listed Options Contracts in a Manner That Does Not Comply With Rule 14.11(i), Managed Fund Shares

May 15, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 2, 2019, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a rule change to allow the Main Sector Rotation ETF (the ''Fund''), a series of the Northern Lights Fund Trust IV (the ''Trust''), to hold listed options contracts in a manner that does not comply with Rule 14.11(i) (''Managed Fund Shares''). The shares of the Fund are referred to herein as the ''Shares.''

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Fund began listing and trading on the Exchange pursuant to the generic listing standards under Rule 14.11(i) governing Managed Fund Shares on September 6, 2017 and remains currently listed on the Exchange pursuant to such rule.[5] The Exchange proposes to continue listing and trading the Shares. The Shares would continue to comply with all of the generic listing standards with the exception of the requirement of Rule 14.11(i)(4)(C)(iv)(b)[6] that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures) (the ''30% Restriction'').[7]

[5] The Commission originally approved BZX Rule 14.11(i) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018) and subsequently approved generic listing standards for Managed Fund Shares under Rule 14.11(i) in Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016) (SR–BATS–2015–100).

[6] Rule 14.11(i)(4)(C)(iv)(b) provides that ''the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).'' The Exchange is proposing that the Fund be exempt only from the requirement of Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures). The Fund will meet the requirement that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures).

[7] The Exchange notes that this proposal is very similar to several previously submitted proposals to list and trade a series of Index Fund Shares and Managed Fund Shares with similar exposures to a single underlying reference asset and U.S. exchange-listed equity securities that were either approved by the Commission or effective upon filing. *See* Securities Exchange Act Release Nos. 83146 (May 1, 2018), 83 FR 20103 (May 7, 2018) (SR–CboeBZX–2018–029); 83679 (July 20, 2018), 83 FR 35505 (July 26, 2018); 77045 (February 3, 2016), 81 FR 6916 (February 9, 2016) (SR–NYSEArca–2015–113) (the ''Amendment''); and 74675 (April 8, 2015), 80 FR 20038 (April 14, 2015) (SR–NYSEArca–2015–05) (collectively, with the Amendment, the ''Arca Filing'').

The Shares are offered by the Trust, which was established as a Delaware statutory trust on June 2, 2015. The Trust is registered with the Commission as an open-end investment company and has filed a registration statement on behalf of the Fund on Form N–1A with the Commission.[8] The Fund's adviser, Main Management ETF Advisors, LLC (the ''Adviser''), is not registered as a broker-dealer, and is not affiliated with a broker-dealer. Personnel who make decisions on the Fund's portfolio composition are currently and shall continue to be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. In the event that (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer; or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser or such new adviser or sub-adviser will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.

Main Sector Rotation ETF

The Fund seeks to outperform the S&P 500 Index in rising markets while limiting losses during periods of decline. In order to achieve its investment objective, under Normal

[8] The Trust filed a supplement to the Fund's prospectus included in its Registration Statement on February 28, 2019 (as supplemented, the ''Registration Statement''). *See* Registration Statement on Form N–1A for the Trust (File Nos. 333–204808 and 811–23066). The descriptions of the Fund and the Shares contained herein are based, in part, on information included in the Registration Statement. The Commission has issued an order granting certain exemptive relief to the Trust and affiliated persons under the Investment Company Act of 1940 (15 U.S.C. 80a–1). *See* Investment Company Act Release No. 30695 (September 24, 2013) (File No. 812–14178).

Market Conditions,[9] the Fund utilizes a ''fund of funds'' structure to invest in U.S. national securities exchange listed sector based equity exchange traded funds (''ETFs''). The Fund seeks to achieve its objective through dynamic sector rotation. The Adviser focuses its research primarily on sector selection by carefully reviewing the sector, industry, and sub-industries in the Fund's portfolio. The Adviser chooses sectors it believes are undervalued and poised to respond favorably to financial market catalysts. The Fund will sell a security when it achieves its target price and is, in the opinion of the Adviser, no longer undervalued.

The Fund's holdings in ETFs currently meet and will continue to meet the generic listing standards for U.S. Component Stocks in Rule 14.11(i)(4)(C)(i)(a). The Fund has the ability to buy or sell exchange-traded call and put options on the S&P 500 Index (''S&P 500 Index Options'') or exchange-traded options on ETFs that track the S&P 500 Index [10] (collectively, with S&P 500 Index Options, the ''S&P 500 Options''). The S&P 500 Index is the index most correlated to the Fund's underlying equity holdings. The options overlay is actively managed by the Adviser and will adapt to both changing market environments and shifts in the underlying equity holdings of the Fund, but is currently limited by the requirement under Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional exposure of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures).

As noted above, Rule 14.11(i)(4)(C)(iv)(b) prevents the Fund from holding listed derivatives based on any single underlying reference asset in excess of 30% of the weight of its portfolio (including gross notional exposures). As proposed, the Fund seeks to hold up to 60% of the weight of its portfolio (including gross notional exposures) in S&P 500 Options in a manner that may not comply with Rule 14.11(i)(4)(C)(iv)(b). The Fund will utilize S&P 500 Options by employing an option strategy of writing covered call or index-based options. The Fund seeks to earn income and gains both from dividends paid on the ETFs and cash premiums received from writing: (i) Covered call options or index-based options on equity-based ETFs held in the Fund's portfolio; and (ii) cash secured put options against cash balances in the Fund. The Fund may also buy puts as a buffer to market selloffs. The ability to hold S&P 500 Options with exposure to a single reference asset up to 60% of the weight of the portfolio (including gross notional exposures) would allow the Fund the flexibility to fully implement its investment strategy. The Exchange notes that the Fund may also hold cash and Cash Equivalents [11] in compliance with Rule 14.11(i)(4)(C)(iii).

As noted above, the Fund's investment in ETFs under Normal Market Conditions constitutes at least 80% of the Fund's assets and such holdings will meet the requirements for U.S. Component Stocks in Rule 14.11(i)(4)(C)(i)(a). In addition to such ETFs holdings, the Fund may hold up to 20% of its assets in cash, Cash Equivalents, and the cash value of S&P 500 Options positions under Normal Market Conditions. The combination of ETFs, cash, Cash Equivalents, and the cash value of S&P 500 Options will constitute the entirety of the Fund's holdings and the cash value of these holdings will be used to form the basis for these calculations. The Exchange notes that this is different than the calculation used to measure the Fund's holdings in S&P 500 Options as it relates to the Fund holding up to 60% of the weight of its portfolio, which, as noted above, is calculated using gross notional exposures gained through the S&P 500 Options in both the numerator and denominator, which is consistent with the derivatives exposure calculation under Rule 14.11(i)(4)(C)(iv). The Exchange represents that, except for the 30% Restriction in Rule 14.11(i)(4)(C)(iv)(b), the Fund's investments will continue to satisfy all of the generic listing standards under BZX Rule 14.11(i)(4)(C) and all other applicable requirements for Managed Fund Shares under Rule 14.11(i).

The Trust is required to comply with Rule 10A–3 under the Act for the initial and continued listing of the Shares of the Fund. In addition, the Exchange represents that the Shares of the Fund will continue to comply with all other requirements applicable to Managed Fund Shares, which include the dissemination of key information such as the Disclosed Portfolio,[12] Net Asset Value,[13] and the Intraday Indicative Value,[14] suspension of trading or removal,[15] trading halts,[16] surveillance,[17] minimum price variation for quoting and order entry,[18] the information circular,[19] and firewalls [20] as set forth in Exchange rules applicable to Managed Fund Shares and the orders approving such rules. Moreover, all of the ETFs and S&P 500 Options held by the Fund will trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[21] All statements and representations made in this filing regarding the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of reference asset and intraday indicative values (as applicable), or the applicability of Exchange listing rules specified in this filing shall constitute continued listing requirements for the Shares. The Fund has represented to the Exchange that it will advise the Exchange of any failure by the Fund or Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. FINRA conducts certain cross-market

[9] The term ''Normal Market Conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues causing dissemination of inaccurate market information or system failures; or force majeure type events such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[10] Options on ETFs that track the S&P 500 Index will include only calls and puts on the five ETFs that track the performance of the S&P 500 Index that have the greatest total options consolidated average daily exchange trading volume in such options for the previous quarter. The Fund will not invest in options on leveraged (*e.g.,* 2X, –2X, 3X, or –3X) ETFs.

[11] As defined in Exchange Rule 14.11(i)(4)(C)(iii)(b), Cash Equivalents are short-term instruments with maturities of less than three months, which includes only the following: (i) U.S. Government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.

[12] *See* Rule 14.11(i)(4)(A)(ii) and 14.11(i)(4)(B)(ii).

[13] *See* Rule 14.11(i)(4)(A)(ii).

[14] *See* Rule 14.11(i)(4)(B)(i).

[15] *See* Rule 14.11(i)(4)(B)(iii).

[16] *See* Rule 14.11(i)(4)(B)(iv).

[17] *See* Rule 14.11(i)(2)(C).

[18] *See* Rule 14.11(i)(2)(B).

[19] *See* Rule 14.11(i)(6).

[20] *See* Rule 14.11(i)(7).

[21] For a list of the current members of ISG, *see www.isgportal.com.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures with respect to such Fund under Exchange Rule 14.12.

Availability of Information

As noted above, the Fund will comply with the requirements under the Rule 14.11(i) related to Disclosed Portfolio, NAV, and the intraday indicative value. Additionally, the intra-day, closing and settlement prices of exchange-traded portfolio assets, specifically the ETFs and S&P 500 Options, will be readily available from the exchanges trading such securities or derivatives, as the case may be, automated quotation systems, published or other public sources, or online information services such as Bloomberg or Reuters. Quotation and last sale information for S&P 500 Options will be available via the Options Price Reporting Authority. Price information for Cash Equivalents will be available from major market data vendors. The Disclosed Portfolio will be available on the Fund's website (*www.mainmgtetfs.com*) free of charge. The Fund's website will include a form of the prospectus for the Fund and additional information related to NAV and other applicable quantitative information. Information regarding market price and trading volume of the Shares will be continuously available throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume for the Shares will be published daily in the financial section of newspapers. Trading in the Shares may be halted for market conditions or for reasons that, in the view of the Exchange, make trading inadvisable. The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange has appropriate rules to facilitate trading in the Shares during all trading sessions. The Exchange prohibits the distribution of material non-public information by its employees. Quotation and last sale information for the Shares and ETFs will be available via the CTA high-speed line.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act [22] in general and Section 6(b)(5) of the Act [23] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest in that the Shares will meet each of the continued listing criteria in BZX Rule 14.11(i) with the exception of the 30% Restriction in Rule 14.11(i)(4)(C)(iv)(b), which requires that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).[24] The Exchange believes that the diversity, liquidity, and market cap of the securities underlying the S&P 500 Index are sufficient to protect against market manipulation of both the Fund's holdings and the Shares as it relates to the S&P 500 Options holdings. The Exchange also believes that the liquidity in the S&P 500 Index Options market [25] mitigates the concerns that Rule 14.11(i)(4)(C)(iv)(b) is intended to address and that such liquidity would also act to prevent other S&P 500 Options from being susceptible to manipulation, and thus, make the Shares less susceptible to manipulation. Further, allowing the Fund to hold a greater portion of its portfolio in S&P 500 Options would mean that the Fund would not be required to use over-the-counter (''OTC'') derivatives if the Adviser deemed it necessary to get exposure in excess of the 30% Restriction in Rule 14.11(i)(4)(C)(iv)(b), which would reduce the Fund's operational burden by allowing the Fund to use listed options contracts to achieve its investment objective and would eliminate the counter-party risk associated with holding OTC derivative instruments.

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. All of the ETFs and S&P 500 Options contracts held by the Fund will trade on markets that are a member of ISG or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange may obtain information regarding trading in the Shares, ETFs, and the S&P 500 Options held by the Fund via the ISG from other exchanges who are a member of ISG or affiliated with a member of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[26] The Exchange further notes that the Fund will meet and be subject to all other requirements of the generic listing rules and other applicable continued listing requirements for Managed Fund Shares under Rule 14.11(i), including those requirements regarding the dissemination of key information such as the Disclosed Portfolio, Net Asset Value, and the Intraday Indicative Value, suspension of trading or removal, trading halts, surveillance, minimum price variation for quoting and order entry, the information circular, and firewalls as set forth in Exchange rules applicable to Managed Fund Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the options strategy of an actively-managed exchange-traded product that will allow the Fund to better compete in the marketplace, thus enhancing competition among both market participants and listing venues, to the benefit of investors and the marketplace.

[22] 15 U.S.C. 78f(b).

[23] 15 U.S.C. 78f(b)(5).

[24] As noted above, the Exchange is proposing that the Fund be exempt only from the 30% Restriction of Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures). The Fund will continue to meet the requirement that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures).

[25] In 2018, more than 1.48 million S&P 500 Index Options contracts were traded per day on Cboe Options, which is more than $350 billion in notional volume traded on a daily basis.

[26] *See* note 21, supra.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [27] and Rule 19b–4(f)(6) thereunder.[28]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [29] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [30] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange represents that the Shares are currently listed and trading pursuant to the generic listing standards under Rule 14.11(i) governing Managed Fund Shares. The Exchange further represents that, while the Fund currently has the ability to buy or sell exchange-traded S&P 500 Options, under the proposal, the Fund seeks to hold up to 60% of the weight of its portfolio (including gross notional exposures) in S&P 500 Options in a manner that may not comply with Rule 14.11(i)(4)(C)(iv)(b).[31] The Exchange represents that, except for the 30% Restriction in Rule 14.11(i)(4)(C)(iv)(b), the Fund's investments will continue to satisfy all of the generic listing standards under BZX Rule 14.11(i)(4)(C) and all other applicable requirements for Managed Fund Shares under Rule 14.11(i). Further, waiver of the 30-day operative delay would allow the Fund to hold a greater portion of its portfolio in S&P 500 Options, which would allow the Fund the flexibility to fully implement its investment strategy and reduce the Fund's operational burden by allowing the Fund to continue to use listed options contracts to achieve its investment objective. The Commission believes that the proposal raises no novel or unique regulatory issues and that, under these circumstances, waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. For these reasons, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.[32]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeBZX–2019–034 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeBZX–2019–034. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBZX–2019–034 and should be submitted on or before June 11, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–10514 Filed 5–20–19; 8:45 am]

BILLING CODE 8011–01–P

[27] 15 U.S.C. 78s(b)(3)(A).

[28] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[29] 17 CFR 240.19b–4(f)(6).

[30] 17 CFR 240.19b–4(f)(6)(iii).

[31] The Exchange notes that the regulated S&P 500 options markets, and the broad base and scope of the S&P 500 Index, make securities that derive their value from that index, including S&P 500 Options, less susceptible to potential market manipulation in view of market capitalization and liquidity of the S&P 500 Index components, price and quote transparency, and arbitrage opportunities. *See* Form 19b–4 at 15, nn.7&25.

[32] For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[33] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15956 and #15957; Guam Disaster Number GU–00007]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Territory of Guam

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Territory of Guam (FEMA–4433–DR), dated 05/07/2019.

Incident: Typhoon Wutip.

Incident Period: 02/23/2019 through 02/25/2019.

DATES: Issued on 05/07/2019.

Physical Loan Application Deadline Date: 07/08/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 02/07/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 05/07/2019, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Area: Territory of Guam

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	2.750
Non-Profit Organizations without Credit Available Elsewhere	2.750
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.750

The number assigned to this disaster for physical damage is 159568 and for economic injury is 159570.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2019–10505 Filed 5–20–19; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15937 and #15938; Kentucky Disaster Number KY–00073]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the Commonwealth of Kentucky

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Kentucky (FEMA–4428–DR), dated 04/17/2019.

Incident: Severe Storms, Straight-Line Winds, Flooding, Landslides, and Mudslides.

Incident Period: 02/06/2019 through 03/10/2019.

DATES: Issued on 05/08/2019.

Physical Loan Application Deadline Date: 06/17/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 01/17/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Kentucky, dated 04/17/2019, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Fulton

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2019–10503 Filed 5–20–19; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15929 and #15930; Iowa Disaster Number IA–00087]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Iowa

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Iowa (FEMA–4421–DR), dated 04/05/2019.

Incident: Severe Storms and Flooding.

Incident Period: 03/12/2019 and continuing.

DATES: Issued on 05/08/2019.

Physical Loan Application Deadline Date: 06/04/2019.

Economic Injury (EIDL) Loan Application Deadline Date: 01/06/2020.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Iowa, dated 04/05/2019, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Adams, Carroll, Dickinson, Fayette, Hamilton, Madison, Mahaska, Page, Palo Alto, Webster.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2019–10504 Filed 5–20–19; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Meeting of the Advisory Committee on Veterans Business Affairs

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal Advisory Committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the next meeting of the Advisory Committee on Veterans Business Affairs (ACVBA). The meeting is open to the public.

DATES: Thursday, June 6, 2019, from 9:00 a.m. to 4:00 p.m. EDT.

ADDRESSES: The meeting will be held at SBA Headquarters, 409 3rd Street SW, Eisenhower Conference Room B, Washington, DC 20416, and via webinar.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however advance notice of attendance is requested. To RSVP and confirm attendance, the general public should email *veteransbusiness@sba.gov* with subject line—''RSVP for 06/06/2019 ACVBA Public Meeting.''

Anyone wishing to make comments to the ACVBA must contact SBA's Office of Veterans Business Development (OVBD) no later than May 31, 2019 via email *veteransbusiness@sba.gov,* or via phone at (202) 205–6773. Comments for the record will be limited to five minutes to accommodate as many participants as possible.

Additionally, special accommodation requests should also be directed to OVBD at (202) 205–6773 or *veteransbusiness@sba.gov.* For more information on veteran owned small business programs, please visit *www.sba.gov/ovbd.*

Security instructions: Those attending the meeting are encouraged to arrive early to allow for security clearance into the building. Attendees should use the main entrance to access SBA Headquarters, at 3rd and D Streets SW. For security purposes attendees must:

1. Present a valid photo ID to receive a visitor badge.
2. Know the name of the event being attended: The meeting event is the Advisory Committee on Veterans Business Affairs (ACVBA).
3. Visitor badges are issued by the security officer at the main entrance. Visitors are required to display their visitor badge at all times while inside the building.
4. Laptops and other electronic devices may be inspected and logged for identification purposes.
5. Due to limited parking options, Metro's Federal Center SW station is the easiest way to access SBA Headquarters.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Advisory Committee on Veterans Business Affairs. The ACVBA is established pursuant to 15 U.S.C. 657(b) note and serves as an independent source of advice and policy. The purpose of this meeting is to discuss efforts that support veteran-owned small businesses, updates on past and current events, and the ACVBA's objectives for fiscal year 2019.

Dated: May 15, 2019.

Nicole Nelson,

Committee Management Officer (Acting).

[FR Doc. 2019–10536 Filed 5–20–19; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Meeting of the Interagency Task Force on Veterans Small Business Development

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of open Federal Advisory Committee Meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time and agenda for the next meeting of the Interagency Task Force on Veterans Small Business Development (IATF). The meeting is open to the public.

DATES: Wednesday, June 5, 2019, from 1:00 p.m. to 4:00 p.m. EDT.

ADDRESSES: The meeting will be held at SBA Headquarters, 409 3rd Street SW, Eisenhower Conference Room B, Washington, DC 20416, and via webinar.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public; however advance notice of attendance is requested. To RSVP and confirm attendance, the general public should email *veteransbusiness@sba.gov* with subject line—''RSVP for 06/05/2019 IATF Public Meeting.''

Anyone wishing to make comments to the Task Force must contact SBA's Office of Veterans Business Development (OVBD) no later than May 31, 2019 via email *veteransbusiness@sba.gov,* or via phone at (202) 205–6773. Comments for the record will be limited to five minutes to accommodate as many participants as possible.

Additionally, special accommodation requests should also be directed to OVBD at (202) 205–6773 or *veteransbusiness@sba.gov.* For more information on veteran owned small business programs, please visit *www.sba.gov/ovbd.*

Security instructions: Those attending the meeting are encouraged to arrive early to allow for security clearance into the building. Attendees should use the main entrance to access SBA Headquarters, at 3rd and D Streets SW. For security purposes attendees must:

1. Present a valid photo ID to receive a visitor badge.
2. Know the name of the event being attended: The meeting event is the Interagency Task Force on Veterans Small Business Development (IATF)
3. Visitor badges are issued by the security officer at the main entrance. Visitors are required to display their visitor badge at all times while inside the building.
4. Laptops and other electronic devices may be inspected and logged for identification purposes.
5. Due to limited parking options, Metro's Federal Center SW station is the easiest way to access SBA Headquarters.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the Interagency Task Force on Veterans Small Business Development (IAFT). The IATF is established pursuant to Executive Order 13540 to coordinate the efforts of Federal agencies to improve capital, business development opportunities, and pre-established federal contracting goals for small business concerns owned and controlled by veterans and service-disabled veterans. The purpose of this meeting is to discuss efforts that support service-disabled veteran-owned small businesses, updates on past and current events, and the IATF's objectives for fiscal year 2019.

Dated: May 15, 2019.

Nicole Nelson,

Committee Management Officer (Acting).

[FR Doc. 2019–10535 Filed 5–20–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF STATE

[Public Notice 10760]

30-Day Notice of Proposed Information Collection: Employment Application for Locally Employed Staff or Family Member

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to June 20, 2019.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection

instrument and supporting documents, to Daniele Schoenauer, who may be reached on 202–663–1966 or at *schoenauerda@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Employment Application for Locally Employed Staff or Family member.
- *OMB Control Number:* 1405–0189.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Bureau of Human Resources, Office of Overseas Employment (HR/OE).
- *Form Number:* DS–0174.
- *Respondents:* The respondents are locals who live in the 175 countries abroad and who are applying for a position at the U.S. Embassy, Consulate or Mission in their country. In addition, Family members who are accompanying their partners to assignments in the U.S. Embassies, Consulates or Mission abroad.
- *Estimated Number of Respondents:* 1,000,000.
- *Estimated Number of Responses:* 1,000,000.
- *Average Time per Response:* 15 minutes.
- *Total Estimated Burden Time:* 250,000 annual hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The information solicited is used to establish eligibility and qualifications at U.S. Embassies, Consulates, and Missions abroad. The respondents are locals who live in the 175 countries abroad and who are applying for a position at the U.S. Embassy, Consulate or Mission in their country. In addition, Family members who are accompanying their partners to assignments in the U.S. Embassies, Consulates or Mission abroad. The authority is the Foreign Service Act of 1980, as amended, and 22 U.S.C. 2669(c).

Methodology

Candidates for employment use the DS–0174 to apply for Mission-advertised positions around the world. Mission recruitments generate approximately 1 million applications per year the majority of which are collected electronically using an applicant management system, Electronic Recruitment Application (ERA). Data that HR and hiring officials extract from the DS–0174 determine employment eligibility and qualifications for the position, and selections according to Federal Policies.

John K. Moyer,

Executive Director.

[FR Doc. 2019–10566 Filed 5–20–19; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF STATE

[Public Notice: 10772]

Notice of Determinations; Culturally Significant Objects Imported for Exhibition—Determinations: ''Apollo's Muse: The Moon in the Age of Photography'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that the objects to be exhibited in the exhibition ''Apollo's Muse: The Moon in the Age of Photography,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, New York, from on or about July 1, 2019, until on or about September 22, 2019, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, SA–5, Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000.

Marie Therese Porter Royce,

Assistant Secretary, Educational and Cultural Affairs, Department of State.

[FR Doc. 2019–10481 Filed 5–20–19; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Requests for Emergency Clearance of a Collection of Information by the Office of Management and for Comments

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of requests for OMB emergency information collection processing and comments.

SUMMARY: The Office of the United States Trade Representative (USTR) is submitting a request to the Office of Management and Budget (OMB) for emergency review and clearance on or about June 20, 2019, that will be effective for six months from that date, of a new information collection request (ICR) titled *301 Exclusion Requests* under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations.

DATES: Submit comments no later than June 7, 2019.

ADDRESSES: Submit comments about the ICR, including the title *301 Exclusion Requests,* to the Office of Information and Regulatory Affairs at OMB, at *oira_submissions@omb.eop.gov,* or 725 Seventeenth Street NW, Washington, DC 20503, Attention: USTR Desk Officer.

FOR FURTHER INFORMATION CONTACT: USTR Assistant General Counsels Philip Butler or Megan Grimball, or Director of Industrial Goods Justin Hoffmann at (202) 395–5725.

SUPPLEMENTARY INFORMATION:

A. Comments

Submit written comments and suggestions to OMB addressing one or more of the following four points:

(1) Whether the proposed ICR is necessary for the proper performance of USTR's functions, including whether

the information will have practical utility.

(2) The accuracy of USTR's estimate of the burden of the proposed ICR, including the validity of the methodology and assumptions used.

(3) Ways to enhance the quality, utility, and clarity of the ICR.

(4) Ways to minimize the burden of the ICR on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

B. Overview of This Information Collection

Title: 301 Exclusion Requests.

OMB Control Number: N/A.

Form Number(s): 301 Exclusion Request/Response/Reply Form.

Description: Following a comprehensive investigation, the U.S. Trade Representative determined that the government of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation were actionable under section 301(b) of the Trade Act of 1974 (19 U.S.C. 2411(b)). The Trade Representative determined that appropriate action to obtain the elimination of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation included the imposition of additional *ad valorem* duties on products from China classified in certain enumerated subheadings of the Harmonized Tariff Schedule of the United States (HTSUS). For background on the proceedings in this investigation, please see the prior notices issued in the investigation, including 82 FR 40213 (August 23, 2017), 83 FR 14906 (April 6, 2018), 83 FR 28710 (June 20, 2018), 83 FR 33608 (July 17, 2018), 83 FR 38760 (August 7, 2018), 83 FR 40823 (August 16, 2018), 83 FR 47974 (September 21, 2018), and 83 FR 49152 (September 28, 2018), 83 FR 65198 (December 19, 2018), 84 FR 7966 (March 5, 2019), 84 FR 20459 (May 9, 2019), and 84 FR 21389 (May 9, 2019).

USTR is establishing a process by which U.S. stakeholders can request the exclusion of particular products classified within a covered tariff subheading from the additional duties that went into effect on September 21, 2018, and May 10, 2019. USTR anticipates that the window for submitting exclusion requests will open on or around June 30, 2019. Requests for exclusion will have to identify a particular product and provide supporting data and the rationale for the requested exclusion. Within 14 days after USTR posts a request for exclusion, interested persons can provide a response with the reasons they support or oppose the request. Interested persons can reply to the response within 7 days after it is posted. To assist in timely and comprehensive review of requests for exclusion, USTR will require respondents to use the Exclusion Request/Response/Reply Form attached to this notice.

Affected Public: U.S. stakeholders who want to request, or comment on a request, to exclude particular products from the additional duties on products from China classified in certain enumerated subheadings of the HTSUS.

Frequency of Submission: One submission per request, response, or reply.

Respondent Universe: U.S. stakeholders.

Reporting Burden:

Total Estimated Responses: 60,000 requests to exclude a particular product; 7,000 responses to a product exclusion request; and 3,000 replies to a response.

Total Estimated Annual Burden: USTR estimates that preparing and submitting a request to exclude a particular product will take approximately 60 minutes, and the total time burden for requests is 60,000 hours. USTR estimates that preparing and submitting a response to a product exclusion request will take approximately 30 minutes, and the total time burden for responses is approximately 3,500 hours. USTR estimates that preparing and submitting a reply will take approximately 30 minutes, and the total time burden for replies is approximately 1,500 hours.

Status: Emergency review. Pursuant to 5 CFR 1320.13, USTR is requesting emergency processing for this ICR because it cannot reasonably comply with normal clearance procedures. To avoid delay that could harm interested U.S. stakeholders and negatively effect trade and investment, the 301 exclusion process must be in place and available to the public on or around June 30, 2019. Upon OMB approval of this emergency clearance request, USTR will follow the normal clearance procedures for the ICR.

Janice Kaye,

Chief Counsel for Administrative Law.

BILLING CODE 3290–F9–P

Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation – Form to Request Exclusion of Product

When submitting an exclusion request, enter the specified information in the following fields and explain the basis and rationale for your statements. Fields marked with an asterisk (*) are required.

By submitting this request for exclusion, you certify that the information provided is complete and correct to the best of your knowledge.

301 Exclusion Request Form

1. Contact Information

Full Organization Legal Name:

Requestor First Name:

Requestor Last Name:

Requestor Mailing Address

Street Address Line 1:

Street Address Line 2:

City:

State:

Zip Code:

Headquarters Country:

Requestor E-mail Address:

Requestor Phone Number:

Are you a third party, such as a law firm, trade association, or customs broker, submitting on behalf of an organization or industry? YES/NO

*Note: If you are submitting on behalf of an organization/industry, you must enter the information below.

Third Party Firm/Association Name:

Third Party First Name:

Third Party Last Name:

Third Party Mailing Address

Street Address Line 1:

Street Address Line 2:

City:

State:

Zip Code:

Third Party E-mail Address:

Third Party Phone Number:

Who is your importer of record?

Who will be the primary point of contact? (Select One):

- o Requestor
- o Third Party Submitter
- o Requestor and Third Party Submitter

2. **Please provide the 10-digit HTSUS item number* for the product you wish to address in this product exclusion request.** ***A 10-digit HTSUS number is required.***
*Use numerical characters only with no special characters (Example: 1023456789). For help with finding the HTSUS item number associated with your product, see https://hts.usitc.gov/.

3. **Please provide a complete and detailed description of the particular product of concern.*** (A detailed description of the product includes, but is not limited to, its physical characteristics (e.g., dimensions, weight, material composition, etc.), whether product is designed to function in or with a particular machine (application), and any unique physical features that distinguish it from other products within the covered 8-digit HTSUS subheading. If needed, please attach images and specification sheets, CBP rulings, court decisions, and previous import documentation below.) **Please also describe the product's principal use.**

*USTR will not consider requests that identify the product using criteria that cannot be made available to the public. USTR will not consider requests in which more than one unique product is identified.

Product Name:

Product Description (e.g. dimensions, weight, material composition, etc.):

Product Function, Application, and Principal Use:

Please upload any relevant attachments that will help identify and distinguish your product (e.g. CBP rulings, photos and specification sheets, and previous import documentation):

4. Requestor's relationship to the product (select all that apply):

- o Importer
- o U.S. Producer
- o Purchaser
- o Industry Association
- o Other

5. Is this product, or a comparable product, available from sources in the United States? (If you indicate "NO" or "NOT SURE," in the box below, you must explain why the product is unavailable or why you are unsure of the product's availability.)

6. Is this product, or a comparable product, available from sources in third countries? (If you indicate "NO" or "NOT SURE," in the box below, you must explain why the product is unavailable or why you are unsure of the product's availability.)

7. Please discuss any attempts to source this product from United States or third countries.

8. Please provide the value in USD and quantity (with units) of the Chinese-origin product of concern that you purchased in 2017, 2018, and the first quarter of 2019. Limit this figure to the products purchased by your firm (or by members of your trade association). Please provide estimates if precise figures are unavailable.

2017 Value:	2017 Quantity:	*Fillable unit box
2018 Value:	2018 Quantity:	*Fillable unit box
2019 Q1 Value:	2019 Q1 Quantity:	*Fillable unit box

Are the provided figures estimates?: YES/NO

Are any of these purchases from a related company? YES/NO

9. Please provide the value in USD and quantity (with units) of the product of concern that you purchased from any third-country source in 2017, 2018, and the first quarter of 2019. Limit this figure to the products purchased by your firm (or by members of your trade association). Please provide estimates if precise figures are unavailable.

2017 Value:	2017 Quantity:	*Fillable unit box
2018 Value:	2018 Quantity:	*Fillable unit box
2019 Q1 Value:	2019 Q1 Quantity:	*Fillable unit box

Are the provided figures estimates?: YES/NO

10. Please provide the value in USD and quantity (with units) of the product of concern that you purchased from domestic sources in 2017, 2018, and the first quarter of 2019. Limit this figure to the products purchased by your firm (or by members of your trade association). Please provide estimates if precise figures are unavailable.

2017 Value:	2017 Quantity:	*Fillable unit box
2018 Value:	2018 Quantity:	*Fillable unit box
2019 Q1 Value:	2019 Q1 Quantity:	*Fillable unit box

Are the provided figures estimates?: YES/NO

11. Please provide information regarding your company's gross revenue in USD for 2018, the first quarter of 2018, and the first quarter of 2019.

Fiscal Year 2018:

First Quarter 2018:

First Quarter 2019:

Are the provided figures estimates?: YES/NO

12. Is the Chinese-origin product of concern sold as a final product or as an input used in the production of a final product or products?

a) For imports sold as final products, please provide:

% of your company's total, U.S. gross sales in 2018 that the Chinese-origin product accounted for.

b) For imports of inputs used in the production of final products, please provide:

% of the total cost of producing the final product(s) the Chinese-origin input accounts for.

% of your company's total, U.S. gross sales in 2018 that sales of the final product(s) incorporating the input accounts for.

13. Please comment on whether the imposition of additional duties (since September 2018) on the product you are seeking to exclude has resulted in severe economic harm to your company or other U.S. interests.

14. Please provide any additional information in support of your request, taking account of the instructions provided in Section [B] of the Federal Register notice.

15. Did you submit exclusion requests for the Section 301 $34 billion (Docket ID: USTR-2018-0025) **and/or the $16 billion** (Docket ID: USTR-2018-0032) **tariff actions?** YES/NO

Please enter the total value of your company's imports applicable to the tariff action for which you submitted one or more exclusion request:

Initial $34 Billion Tariff Action:

Additional $16 Billion Tariff Action:

16. Please comment on whether the particular product of concern is strategically important or related to "Made in China 2025" or other Chinese industrial programs. You must explain in the box below why you believe the product of concern is or is not strategically important or related to "Made in China 2025" or other Chinese industrial programs.

17. Include any additional attachments that should be considered along with this exclusion request (e.g., customs rulings, court decisions, previous import documentation, etc.). Please do not include attachments that contain your written argument.

Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation – File a Response to an Exclusion Request

When submitting a Response, enter the specified information in the following fields and explain the basis and rationale for your statements. Fields marked with an asterisk (*) are required.

By submitting this Response, you certify that the information provided is complete and correct to the best of your knowledge.

301 Exclusion Response Fields

1. Responder Information

Responder First Name*:

Responder Last Name*:

Organization Name:

Relationship to Requestor:

- ○ Supplier
- ○ Purchaser
- ○ Competitor
- ○ Subsidiary
- ○ Industry Group
- ○ State or Local Level Official
- ○ Member of Congress
- ○ Other (Please Specify):

2. Please state your position on the requestor's product exclusion request.

- ○ Support
- ○ Oppose

3. Please provide a Response in the text field below. We encourage you to include information relevant to the criteria outlined in Section [B] of the Federal Register notice, particularly on the availability of the requested product. Your Response will be viewable to the Public. Please do not include Business Confidential Information in the provided field.*

4. Include any additional attachments that should be considered along with this Response. Attachments will be viewable to the Public. Please do not include attachments that contain Business Confidential Information.

Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation – File a Reply to a Response

When submitting a Reply, enter the specified information in the following fields and explain the basis and rationale for your statements. Any Reply must be posted within the later of 7 days after the close of the 14 day Response period, or 7 days after the posting of a Response. All Replies must clearly identify the specific Responses being addressed. Fields marked with an asterisk (*) are required.

By submitting this Reply, you certify that the information provided is complete and correct to the best of your knowledge.

301 Exclusion Reply Fields

1. **Please enter your Reply in the text field below. Your Reply will be viewable to the Public. Please do not include Business Confidential Information in the provided field.***

2. **Include any additional attachments that should be considered along with this Reply. Attachments will be viewable to the Public. Please do not include attachments that contain Business Confidential Information.**

[FR Doc. 2019–10482 Filed 5–20–19; 8:45 am]
BILLING CODE 3290–F9–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. FAA–2019–29]

Petition for Exemption; Summary of Petition Received; Uber Elevate, Inc.

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before June 10, 2019.

ADDRESSES: Send comments identified by docket number FAA–2019–0346 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Nia Daniels, (202) 267–7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on May 16, 2019.

Lirio Liu,

Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2019–0346.
Petitioner: Uber Elevate, Inc.
Sections of 14 CFR Affected: 43.10(c)(5) and (d); 91.9(b)(2); 91.119(b) and (c); 91.121; 91.151; 91.209; 135.21(f); 135.25(a)(1) and (2); 135.63(c) and (d); 135.65(a) and (d); 135.79(a)(1)–(3); 135.109(b); 135.149(a); 135.161(a)(1),(2), and (3); 135.209; and 135.243(b).

Description of Relief Sought: Uber Elevate, Inc. seeks exemptions to allow it to conduct part 119 air carrier operations for compensation or hire under part 135 using small unmanned aircraft systems (small UAS). Specifically, Uber Elevate, Inc. seeks permission to conduct small UAS air carrier operations for commercial food package delivery in the United States, initially in the City of San Diego.

[FR Doc. 2019–10593 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

June 6, 2019 Drone Advisory Committee (DAC) Meeting

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Announcement of meeting.

SUMMARY: The FAA is issuing this notice to announce the June 6, 2019 DAC Meeting to the public.

DATES: The meeting will be held on June 6, 2019, 9:00 a.m.–4:00 p.m. Eastern Time.

ADDRESSES: The meeting will be held at the Hyatt Regency Crystal City (Regency E, Ballroom Level), 2799 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: For questions about the DAC, please visit *https://www.faa.gov/uas/programs_partnerships/dac/* or contact Erik Amend, Manager, Executive Office, UAS Integration Office, at *erik.amend@faa.gov* or 202–267–8282.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given of the June 6, 2019 DAC Meeting. The DAC is a Federal Advisory Committee managed by the FAA. The agenda will likely include, but may not be limited to, the following:

- Official Statement of the Designated Federal Officer
- Approval of the Agenda and Minutes
- Opening Remarks
- FAA Update
- Update on Counter-UAS Technology Trends
- The FAA's Plan to Address the FAA Reauthorization Act of 2018
- Discussion on Knowledge Test for Recreational Drone Operators
- Industry-Led Technical Topics
- New Business/Agenda Topics
- Closing Remarks
- Adjourn

The agenda will be available through the **Federal Register**, the FAA's Notices of Public Meetings web page (*https://www.faa.gov/regulations_policies/rulemaking/npm/*), and the FAA's DAC web page (*https://www.faa.gov/uas/programs_partnerships/dac/*).

Attendance is open to the interested public but limited to space available. Registration is required for this meeting; members of the public may register at *DACmeetingRSVP@faa.gov* until May 31, 2019.

Members of the public may present a written statement to the committee at any time. The FAA is not accepting oral presentations at this meeting due to time constraints.

If you are in need of assistance or require a reasonable accommodation for this meeting, please contact the person listed under the heading **FOR FURTHER INFORMATION CONTACT**. Sign and oral interpretation, as well as a listening device, can be made available if requested 10 calendar days before the meeting.

Issued in Washington, DC, on May 15, 2019.

Erik W. Amend,

Manager, Executive Office, AUS–10, FAA UAS Integration Office.

[FR Doc. 2019–10591 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescission of Revised Record of Decision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of rescission of Revised Record of Decision (ROD).

SUMMARY: The FHWA is issuing this notice to advise the public that the April 22, 2013, Revised ROD for the proposed Sakonnet River Bridge, Rehabilitation or Replacement in the Towns of Portsmouth and Tiverton, Newport County, Rhode Island is rescinded effective with this notice and replaced with the August 2003 original ROD signed by FHWA.

FOR FURTHER INFORMATION CONTACT: Mr. Carlos E. Padilla-Fresse, Program Delivery Supervisor, Federal Highway Administration Rhode Island Division, 380 Westminster Mall, Suite 601, Providence, Rhode Island 02903, (401) 528–4577, *Carlos.Padilla@dot.gov.* Office hours are from 8:00 a.m. to 4:30 p.m. (Eastern Time), Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The FHWA, as the lead Federal agency, in cooperation with the Rhode Island Department of Transportation (RIDOT), is rescinding the April 22, 2013, Revised ROD for the proposed Sakonnet River Bridge, Rehabilitation or Replacement in the Towns of Portsmouth and Tiverton, Newport County, Rhode Island. The FHWA is rescinding the 2013 Revised ROD, per the Rhode Island Department of Transportation (RIDOT) request. Rescinding the 2013 Revised ROD will invalidate the actions taken pertaining to the implementation of tolling on the Sakonnet River Bridge.

Any future Federal-aid action within the Sakonnet River Bridge must comply with environmental review requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321), FHWA NEPA implementing regulations (23 CFR 771) and related authorities, as appropriate. Comments and questions concerning this action should be directed to FHWA at the address provided above.

Issued on: May 15, 2019.

Carlos C. Machado,

FHWA Rhode Island Division Administrator, Providence, Rhode Island.

[FR Doc. 2019–10594 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0037]

Agency Information Collection Activities; Notice and Request for Comment; Driver Interactions With Advanced Driver Assistance Technologies

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a proposed collection of information.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) announces our intention to request the Office of Management and Budget's (OMB) approval of a proposed collection of certain information by the Agency. Before a Federal agency can collect certain information from the public, it must receive approval from OMB. Procedures established under the Paperwork Reduction Act of 1995 (the PRA) require Federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for

public comment in response to the notice. The proposed collection of information supports research addressing safety-related aspects of driver interactions with certain advanced driver assistance technologies.

DATES: Comments must be received on or before July 22, 2019.

ADDRESSES: You may submit comments identified by the docket number in the heading of this document or by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments on the electronic docket site by clicking on ''Help'' or ''FAQ''.
- *Mail:* Docket Management Facility. M–30, U.S. Department of Transportation. 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* U.S Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal Holidays.
- *Fax:* 202–493–2251.

Instructions: Each submission must include the Agency name and the Docket number for this Notice. Note that all comments received will be posted without change to *www.regulations.gov,* including any personal information provided. Please see the Privacy heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov,* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Elizabeth Mazzae, Applied Crash Avoidance Research Division, Vehicle Research and Test Center, NHTSA, 10820 State Route 347—Bldg. 60, East Liberty, Ohio 43319; Telephone (937) 666–4511; Facsimile: (937) 666–3590; email address: *elizabeth.mazzae@dot.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collection of information:

Title: Driver Interactions with Advanced Driver Assistance Technologies.

Type of Request: New collection.

Type of Review Requested: Regular.

OMB Clearance Number: New Collection.

Form Number: None.

Requested Expiration Date of Approval: Three years from date of approval.

Summary of the Collection of Information: NHTSA proposes to perform research involving the collection of information from the public as part of a multi-year effort to learn about drivers' use of and behavior in interacting with certain advanced driver assistance technologies. The research will involve on-road, semi-naturalistic driving experimentation in which participants who are members of the general public will drive government-owned instrumented production vehicles equipped with driver assistance technologies. Participants will include both drivers with and drivers without experience with advanced cruise control and lane keeping assistance technologies. Experienced drivers will be ones who own one of the two vehicle models equipped with advanced cruise control and lane keeping assistance features being used in this research. Participants will engage driver assistance technologies, including advanced cruise control and lane keeping assistance, while driving a specified route traversing public highways. Participants' actions to engage the assistance features and responses to unrequested disengagements will be observed and recorded.

Questions will be asked during the course of the research to assess individuals' suitability for study participation, to obtain feedback regarding participants' use of the driver assistance technologies, and to gauge individuals' level of comfort with and confidence in the technologies' performance and safety.

Description of the Need for the Information and Proposed Use of the Information: The National Highway Traffic Safety Administration's (NHTSA) mission is to save lives, prevent injuries, and reduce healthcare and other economic costs associated with motor vehicle crashes. As driver assistance technologies advance, they have the potential to dramatically reduce the number of motor vehicle crashes, injuries, and associated economic costs. The safety and effectiveness of the technologies depends on drivers understanding the capabilities, constraints, and visual and auditory alerts provided. Drivers' understanding of when assistance features are available to use and when they are not or are disengaging is important for safety. In particular, drivers must understand and respond quickly when a feature indicates that it is disengaging and the driver must retake full manual control of driving. This work seeks to gather information regarding how drivers who are inexperienced compare to drivers with experience using driver assistance features including advanced cruise control and lane keeping assistance. The research will compare the two groups' use of these features in interactions, response to disengagement notifications, and proper use.

The collection of information will consist of: (1) Question Set 1, Driving Research Study Interest Response Form, (2) Question Set 2, Screening Questions, (3) passive observation of driving behavior, and (4) Question Set 3, Post-Drive Questionnaire.

The information to be collected will be used for the following purposes:

- *Question Set 1, Driving Research Study Interest Response Form* will be used to determine individuals'

willingness to participate in the study and whether an individual qualifies for participation in this study based on certain information, such as primary vehicle make/model. For example, participants must:

- Be at least 21 years of age
- Hold a valid U.S. or Canadian driver's license
- Drive at least 14,000 miles annually

Participants must also be willing to provide their contact information for the purposes of coordinating participation.

- *Question Set 2, Screening Questions* will be primarily used to ensure that participants meet certain minimum health qualifications, are free of recent criminal convictions, and have reasonable availability to participate in the study. The objective of health screening questions is to identify candidate participants whose physical and health conditions may be deemed ''average'' and are compatible with being able to drive continuously for approximately 3 hours a vehicle equipped with only original equipment components.
- *Question Set 3, Post-Drive Questionnaire* will be used to get information about the participants' experiences during the experimental drive, including the difficulty of using the automated system, trust in the automated system, incidences of mode confusion, and any safety considerations related to the system. There will be two versions of the questionnaire: One for participants who do not have experience with one of two study vehicle models equipped with advanced cruise control and lane keeping assistance prior to the study, and one for participants do have experience with these features in one of the two study vehicle models. The experienced participant questionnaire will include additional questions addressing individuals' personal experience with the driver assistance feature technologies in their personal vehicle and, for participants who drive a study vehicle model that is different from their personal vehicle, their opinions regarding differences between the two vehicles' driver assistance feature driver interface implementations and any difficulties using those features in the vehicle with which they were not experienced prior to the study.

Affected Public (Respondents): Research participants will be licensed drivers aged 25–54 years who drive at least 14,000 miles annually, are in good health, and do not require assistive devices to safely operate a vehicle and drive continuously for a period of 3 hours.

Estimated Number of Respondents: Information will be collected in an incremental fashion to permit the determination of which individuals have the necessary characteristics for study participation. All interested candidates will complete Question Set 1, Driving Research Study Interest Response Form. A subset of individuals meeting the criteria for Question Set 1 will be asked to complete Question Set 2, Screening Questions. From the individuals found to meet the criteria for both Questions sets 1 and 2, a subset will be chosen with the goal of achieving a sample providing a balance of age and sex to be scheduled for study participation. A summary of the estimated numbers of individuals that will complete the noted question sets is provided in the following table.

ESTIMATED NUMBER OF RESPONDENTS

Questions	Total N
Question Set 1, Driving Research Study Interest Response Form	1,000
Question Set 2, Screening Questions	600
Question Set 3, Post-Drive Questionnaire	300

Estimated Time per Response: Completion of Question Set 1, Driving Research Study Interest Response Form is estimated to take approximately 5 minutes and completion is estimated to take approximately 7 minutes for Question Set 2, Screening Questions. Completion of Question Set 3, Post-Drive Questionnaire is estimated to take 15 minutes per inexperienced participant and 20 minutes per experienced participant. The estimated annual time and cost burdens are summarized in the table below. The number of respondents and time to complete each question set are estimated as shown in the table. The time per question set is calculated by multiplying the number of respondents by the time per respondent and then converting from minutes to hours. The hour value for each question set is multiplied by the latest average hour earning estimate from the Bureau of Labor Statistics to obtain an estimated burden cost per question set.[1]

ESTIMATED TIME PER RESPONSE AND TOTAL TIME

Question set	Question topic	Participants	Time per response (minutes)	Total time (minutes)	Total time (hours)	Total cost
1	Driving Research Study Interest Response Form.	1,000	5	5,000	83.33	$2,304.91
2	Screening Questions	600	7	4,200	37.5	1,936.20
3	Post-Drive Questionnaire, Inexperienced	150	15	2,250	50	1037.25
	Post-Drive Questionnaire, Experienced	150	20	3,000	75	1,383.00
Total Estimated Burden.			14,450	240.83	6,661.36	

[1] Bureau of Labor Statistics Feb. 2019 Average Hourly Earnings data for ''Total Private,'' $27.66 (Accessed 3/8/2019 at *https://www.bls.gov/news.release/empsit.t19.htm*).

Total Estimated Annual Burden: 240.83 hours.

Frequency of Collection: The data collection described will be performed once to obtain the target number of valid test participants.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.95.

Issued in Washington, DC, on May 14, 2019.

Tim J. Johnson,

Acting Associate Administrator for Vehicle Safety Research.

[FR Doc. 2019–10582 Filed 5–20–19; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[Docket No. TTB–2019–0001]

Proposed Information Collections; Comment Request (No. 74)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB); Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before July 22, 2019.

ADDRESSES: As described below, you may send comments on the information collections described in this document using the ''*Regulations.gov*'' online comment form for this document, or you may send written comments via U.S. mail or hand delivery. We no longer accept public comments via email or fax.

- *Internet:* To submit comments online, use the comment form for this document posted within Docket No. TTB–2019–0001 on the ''*Regulations.gov*'' e-rulemaking website at *https://www.regulations.gov;*
- *U.S. Mail:* Send comments to the Paperwork Reduction Act Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005.
- *Hand Delivery/Courier:* Delivery comments to the Paper Reduction Act Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Suite 400, Washington, DC 20005.

Please submit separate comments for each specific information collection described in this document. You must reference the information collection's title, form or recordkeeping requirement number, and OMB control number (if any) in your comment.

You may view copies of this document, the information collections described in it and any associated instructions, and all comments received in response to this document within Docket No. TTB–2019–0001 at *https://www.regulations.gov.* A link to that docket is posted on the TTB website at *https://www.ttb.gov/forms/comment-on-form.shtml.* You may also obtain paper copies of this document, the information collections described in it and any associated instructions, and any comments received in response to this document by contacting Michael Hoover at the addresses or telephone number shown below.

FOR FURTHER INFORMATION CONTACT: Michael Hoover, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; 202–453–1039, ext. 135; or *informationcollections@ttb.gov* (please do not submit comments to this email address).

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections described below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information has a valid OMB control number.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms, letterhead applications or notices, recordkeeping requirements, questionnaires, or surveys:

OMB Control No. 1513–0002

Title: Personnel Questionnaire—Alcohol and Tobacco Products.

TTB Form Number: TTB F 5000.9.

Abstract: Provisions of the Internal Revenue Code (IRC; 26 U.S.C chapters 51 and 52) and the Federal Alcohol Administration Act (FAA Act; 27 U.S.C. 201 *et seq.*) require persons wishing to engage in certain alcohol and tobacco activities to obtain a permit, or approval of a notice or registration, from the Secretary of the Treasury (the Secretary) before beginning operations. The IRC and FAA Act provide that an applicant is not eligible for such permits or approvals if the Secretary finds that the applicant, (including company officers, directors, or principal investors) is not likely to lawfully operate or has certain criminal convictions. Under its delegated IRC and FAA Act authorities, the TTB regulations authorize the collection of information from applicants so that TTB can determine if they meet the minimum statutory and regulatory qualifications for alcohol and tobacco permits, notices, or registrations. To assist TTB in making such determinations, applicants use form TTB F 5000.9, Personnel Questionnaire—Alcohol and Tobacco, or its web-based Permits Online equivalent, to provide TTB with information regarding their identity, business history and financing, and criminal record, if any.

Current Actions: TTB is submitting this collection as a revision due to program changes made at the Bureau's discretion. TTB has revised TTB F 5000.9 and its electronic Permits Online equivalent to reduce the amount of information collected and lower the per-respondent burden associated with this information collection. TTB has removed certain data fields that it no longer needs to determine a

respondent's identity or eligibility; the removed data fields include the respondent's residence and employment history, citizenship status, plans for additional investments in the applicant business, and bank reference. TTB estimates that removal of those data fields will reduce the per-respondent burden for this collection by at least 20 minutes, resulting in a per-respondent burden of 60 minutes for the TTB F 5000.9 form and 50 minutes for its electronic Permits Online equivalent. These program changes will reduce the estimated total annual burden for this information collection by 4,033 hours. In addition, due to a change in agency estimates, TTB is reducing the number of annual respondents to this information collection from 14,283 to 9,350 (a reduction of 2,750), which further reduces the estimated total annual burden for this collection by 2,292 hours.

Type of Review: Revision of a currently-approved collection.

Affected Public: Individuals or households.

Estimated Annual Burden

- *Number of Respondents:* 9,350.
- *Average Responses per Respondent:* 1 (on occasion).
- *Number of Responses:* 9,350.
- *Average Per-response Burden:* 51 minutes.
- *Total Burden:* 7,958 hours.

OMB Control No. 1513–0035

Title: Inventory—Export Warehouse Proprietor.

TTB Form Number: TTB F 5220.3.

Abstract: The IRC at 26 U.S.C. 5721 requires export warehouse proprietors to take inventories of all tobacco products, processed tobacco, and cigarette papers and tubes on hand at the commencement of business, the conclusion of business, and at other times as the Secretary prescribes by regulation. Under that authority, the TTB regulations in 27 CFR part 44 require export warehouse proprietors to report their inventory of tobacco products, processed tobacco, and cigarette papers and tubes using TTB F 5220.3, Inventory—Export Warehouse Proprietor, when beginning or discontinuing business, when certain changes in ownership or control of the business occur, or when required to by the appropriate TTB officer. As authorized by the IRC at 26 U.S.C. 5741, the TTB regulations also require export warehouse proprietors to retain a file copy of each such inventory report for 3 years, available for TTB inspection upon request.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is decreasing the number of respondents, responses, and burden hours associated with this information collection due to a decrease in the number of export warehouse proprietors.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 82.
- *Average Responses per Respondent:* 1 per year.
- *Number of Responses:* 82.
- *Average Per-response Burden:* 5 hours.
- *Total Burden:* 410 hours.

OMB Control No. 1513–0045

Title: Distilled Spirits Plants—Excise Taxes (TTB REC 5110/06).

TTB Recordkeeping Number: TTB REC 5110/06.

Abstract: Under chapter 51 of the IRC, distilled spirits produced or imported into the United States are subject to Federal excise tax, which is determined at the time the spirits are withdrawn from bond and which is paid by return, subject to regulations prescribed by the Secretary. In addition, a credit may be taken against that tax for the portion of a distilled spirits product's alcohol content derived from wine or flavors. The TTB regulations in 27 CFR parts 19 and 26 require distilled spirits excise taxpayers to keep certain records in support of the information provided on their excise tax returns, including information on the distilled spirits removed from their premises and the products' applicable tax rates, as well as records related to nontaxable removals, shortages, and losses. The required records are necessary to protect the revenue as TTB uses the data collected to ensure the appropriate amount of tax is paid, to verify claims for refunds or remission of tax, and to account for the transfer of certain distilled spirits excise taxes to the governments of Puerto Rico and the U.S. Virgin Islands.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is increasing the number of reported respondents, responses, and burden hours associated with this information collection due to continued growth in the number of distilled spirits plants.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 3,160.
- *Average Responses per Respondent:* 26 per year.
- *Number of Responses:* 82,160.
- *Average Per-response Burden:* 1 hour.
- *Total Burden:* 82,160 hours.

OMB Control No. 1513–0046

Title: Formula for Distilled Spirits under the Federal Alcohol Administration Act.

TTB Form Number: TTB F 5110.38.

Abstract: The FAA Act at 27 U.S.C. 205(e) authorizes the Secretary to issue regulations regarding the labeling of distilled spirits products to prevent consumer deception, to provide the consumer with adequate information as to the identity and quality of such products, and to require a statement of composition in certain cases of distilled spirits produced by blending or rectification or if neutral spirits were used in the product's production, while the IRC at 26 U.S.C. 5222(c), 5223, and 5232, authorizes the Secretary to issue regulations regarding the removal and addition of extraneous substances to distilling materials or the redistillation of domestic and imported spirits. Under those authorities, the TTB regulations in 27 CFR parts 5, 19, and 26 require proprietors to obtain TTB approval of formulas for distilled spirits products when operations such as blending, mixing, purifying, refining, compounding, or treating, change the character, composition, class, or type of the spirits. Such formulas are now filed using TTB F 5110.10, although TTB continues to allow industry members to file the information using the legacy form TTB F 5110.38. Respondents use this form to list ingredients, and, in some cases, the process used to produce the product. The collected information allows TTB to determine whether a distilled spirits product meets the applicable statutory and regulatory requirements.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, due to a change in agency estimates, TTB is increasing the number of respondents, responses, and burden hours associated with this information collection from 30 each to 50 each.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 50.

• *Average Responses per Respondent:* 1 (on occasion).
• *Number of Responses:* 50.
• *Average Per-response Burden:* 1 hour.
• *Total Burden:* 50 hours.

OMB Control No. 1513–0063

Title: Stills: Notices, Registration, and Records.

TTB Recordkeeping Number: TTB REC 5150/8.

Abstract: The IRC, at 26 U.S.C. 5101 and 5179, allows the Secretary to issue regulations to require manufacturers of stills to submit notices regarding the manufacture and setup of stills, and it requires all persons who possess or have custody of a still to register it with the Secretary and provide information as to its location, type, capacity, ownership, and the purpose for which it will be used. Under those authorities, the TTB regulations in 27 CFR part 29 require still manufacturers to provide certain notices and keep certain records regarding the manufacture and setup of stills. Those regulations also require still owners to register their stills with TTB and provide certain notices and keep certain records regarding such registrations and changes in ownership or location of stills.

Current Actions: TTB is submitting this information collection for extension purposes only, and there are no changes to the collection or its estimated annual burden.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

• *Number of Respondents:* 10.
• *Average Responses per Respondent:* 4 per year.
• *Number of Responses:* 40.
• *Average Per-response Burden:* 1 hour.
• *Total Burden:* 40 hours.

OMB Control No. 1513–0068

Title: Records of Operations—Manufacturer of Tobacco Products or Processed Tobacco.

TTB Recordkeeping Number: TTB REC 5210/1.

Abstract: The IRC at 26 U.S.C. 5741 requires manufacturers of tobacco products, cigarette papers or tubes, or processed tobacco to keep records, subject to Government inspection, as the Secretary prescribes by regulation. Under that authority, the TTB regulations in 27 CFR part 40 require such manufacturers to keep daily records regarding raw materials received and products manufactured, removed, returned, consumed, transferred, destroyed, lost, or disclosed as shortages. Those regulations provide that manufacturers may use usual and customary commercial records, where possible, to keep and maintain the required data, provided that TTB may readily ascertain the information. Also, manufacturers must maintain the required records for 3 years and make them available for TTB inspection upon request. This information collection is necessary to provide accountability over the receipt, production, and disposition of tobacco products, cigarette papers and tubes, and processed tobacco in order to prevent diversion and protect the revenue.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is decreasing the number of annual respondents, responses, and burden hours reported for this information collection due to a decrease in the number of tobacco product manufacturers.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

• *Number of Respondents:* 235.
• *Average Responses per Respondent:* 1 per year.
• *Number of Responses:* 235.
• *Average Per-response Burden:* 2 hours. (This burden estimate allows for the potential that not all of the information required under this collection can be derived from usual and customary business records.)
• *Total Burden:* 470 hours.

OMB Control No. 1513–0070

Title: Tobacco Export Warehouse—Record of Operations.

TTB Recordkeeping Number: TTB REC 5220/1.

Abstract: In general, export warehouses store untaxpaid tobacco products and cigarette papers and tubes, and processed tobacco which is not subject to tax, until those commodities are exported. The IRC at 26 U.S.C. 5741 requires export warehouse proprietors to keep records regarding such commodities, subject to Government inspection, as the Secretary prescribes by regulation. Under that authority, the TTB regulations in 27 CFR part 44 require export warehouse proprietors to keep records showing the date, kind, and quantity of tobacco products, cigarette papers and tubes, and processed tobacco received, removed, transferred, destroyed, lost, or returned to a manufacturer or customs bonded warehouse proprietor. Those regulations also provide that respondents may use usual and customary commercial records to keep and maintain the required data, provided that TTB may readily ascertain the information. In addition, the regulations state that respondents must maintain the required records for 3 years and make them available for TTB inspection upon request. This information collection is necessary to provide accountability over the transfer and export of tobacco products, cigarette papers and tubes, and processed tobacco to protect the revenue by preventing the diversion of untaxed commodities into the domestic market.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is decreasing the number of respondents and responses reported for this collection due to a decrease in the number of export warehouse proprietors.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

• *Number of Respondents:* 70.
• *Average Responses per Respondent:* 1 (ongoing recordkeeping).
• *Number of Responses:* 70.
• *Average Per-response and Total Burden:* None. (Per the OMB regulation at 5 CFR 1320.3(b)(2), there is no burden associated with the collection of usual of customary records kept during the normal course of business.)

OMB Control No. 1513–0072

Title: Applications and Notices—Manufacturers of Nonbeverage Products.

TTB Recordkeeping Number: TTB REC 5530/1.

Abstract: The IRC, at 26 U.S.C. 5111–5114, authorizes manufacturers of nonbeverage products to claim drawback (refund) of all but $1.00 per proof gallon of the Federal excise tax paid on any distilled spirits used in the manufacture of such products, and it authorizes the Secretary to require a bond or other security for such drawback claims. Under that IRC authority, the TTB regulations in 27 CFR part 17 require manufacturers of nonbeverage products using distilled spirits on which drawback will be claimed to register as such, and to submit certain letterhead applications and notices. Such manufacturers must submit applications, which require TTB approval, for nonbeverage distilled spirits operations that present the most jeopardy to the revenue, while

manufacturers submit notices, which do not require TTB approval, for such activities that present less jeopardy to the revenue. This information collection allows TTB to ensure that nonbeverage distilled spirits operations are in compliance with Federal law, and to protect the revenue as it accounts for, and deters diversion of, distilled spirits to taxable beverage uses.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is decreasing the number of annual respondents, responses, and burden hours reported for this collection due to a decrease in the number applications and notices received from nonbeverage product manufacturers.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 350.
- *Average Responses per Respondent:* 2 per year.
- *Number of Responses:* 700.
- *Average Per-response Burden:* 30 minutes.
- *Total Burden:* 350 hours.

OMB Control No. 1513–0077

Title: Records of Things of Value to Retailers, and Occasional Letter Reports from Industry Members Regarding Information on Sponsorships, Advertisements, Promotions, etc. under the FAA Act.

TTB Recordkeeping Number: TTB REC 5190/1.

Abstract: The FAA Act at 27 U.S.C. 205 generally prohibits alcohol beverage producers, importers, or wholesalers from offering inducements to alcohol retailers—giving things of value or conducting certain types of advertisements, promotions, or sponsorships—unless such an action is specifically exempted by regulation. Under that FAA Act authority, the TTB regulations in 27 CFR part 6, ''Tied-House,'' describe exceptions to the general FAA Act prohibition on offering inducements to retailers and also describe things that are considered to be ''things of value'' for purposes of determining whether an inducement has been offered. Among other provisions, those regulations require alcohol beverage industry members to keep records concerning things of value furnished to retailers, identifying the item and the retailer receiving it, along with the industry member's cost and any charges to the retailer for the item. Industry members may use usual and customary commercial records to satisfy that recordkeeping requirement, and such records must be retained for 3 years, available for TTB inspection. In addition, the part 6 regulations provide that TTB may require, as part of a trade practice investigation, a letter report from an industry member regarding any advertisements, promotions, sponsorships, or other activities conducted by, on behalf of, or benefiting the industry member. This information collection is necessary to detect and prevent unfair trade practices as defined by the FAA Act, and ensure compliance with the Act's trade practice exceptions and limitations.

Current Actions: There are no changes to this collection, and TTB is submitting it for extension purposes only. However, TTB is increasing the number of annual respondents and responses reported for this collection due to an increase in the number of alcohol industry members. TTB also is reporting an increase in the burden hours for this collection's reporting requirement due to a change in agency estimates.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 59,950 (59,940 for recordkeeping and 10 for reporting).
- *Average Responses per Respondent:* 1 (one response for ongoing recordkeeping for 59,940 respondents and one reporting response for 10 respondents).
- *Number of Responses:* 59,950 (54,940 for recordkeeping and 10 for reporting).
- *Average Per-response Burden:* For the 54,940 respondents required to keep records, under the OMB regulations at 5 CFR 1320.3(b)(2), there is no per-respondent burden for the keeping of the usual of customary business records required under this collection. For the 10 respondents required by TTB to submit letter reports, the estimated burden is 8 hours per response.
- *Total Burden:* 80 hours.

OMB Control No. 1513–0078

Title: Applications for Permit to Manufacture or Import Tobacco Products or Processed Tobacco or to Operate an Export Warehouse and Applications to Amend Such Permits.

TTB Form Numbers: TTB F 5200.3, 5200.16, 5230.4, and 5230.5.

Abstract: The IRC at 26 U.S.C. 5712 and 5713 requires that importers and manufacturers of tobacco products or processed tobacco and export warehouse proprietors apply for and obtain a permit before engaging in such operations, or at such other times, as the Secretary may prescribe by regulation. In addition, 26 U.S.C. 5712 sets forth certain circumstances under which a permit application may be denied, such as if the applicant, including any corporate officer, director, or principle stockholder, is ineligible to obtain a permit by reason of business experience, financial standing, or certain criminal convictions. Under those IRC authorities, the TTB regulations in 27 CFR parts 40, 41, and 44 require tobacco industry members to submit applications using the prescribed TTB forms for new permits or, under certain circumstances, amended permits. Applicants use those forms and any required supporting documents to identify themselves and their business, along with its location, organization, financing, and major investors. Once TTB issues a permit, the permittee must retain a copy of their application package for as long as they continue in business, available for TTB inspection upon request. This information collection is necessary to protect the revenue by ensuring that only those entities eligible for a permit under the law are provided a permit to engage in such businesses.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is increasing the number of annual respondents, responses, and burden hours reported for this collection due to increases in the number of applications for amended permits.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits; and State, local, and tribal governments.

Estimated Annual Burden

- *Number of Respondents:* 470.
- *Average Responses per Respondent:* 1 (on occasion).
- *Number of Responses:* 470.
- *Average Per-response Burden:* 80 minutes.
- *Total Burden:* 627 hours.

OMB Control No. 1513–0080

Title: Distilled Spirits Plant Equipment and Structures.

TTB Recordkeeping Number: TTB REC 5110/12.

Abstract: The IRC at 26 U.S.C. 5178 and 5180 authorizes the Secretary to issue regulations regarding the location, construction, and arrangement of distilled spirits plants (DSPs), the identification of DSP structures,

equipment, pipes, and tanks, and the posting of an exterior sign at their place of business. The IRC at 26 U.S.C. 5206 also requires DSP proprietors to mark containers of distilled spirits, subject to regulations prescribed by the Secretary. The TTB regulations concerning the identification of DSP plants, equipment, structures, and bulk containers are contained in 27 CFR part 19. Those regulations describe the exterior identification sign required at DSPs and the identification signs or marks on DSP structures, cookers, fermenters, stills, tanks, and other major equipment. The regulations also require tank cars and tank trucks used by DSPs as bulk conveyances for distilled spirits to be permanently and legibly marked with identifying information and capacity. The information set forth under this information collection is necessary to protect the revenue and facilitate inspections, as TTB uses the required signs and marks to identify the location, use, and capacity of a DSP's structures, equipment, and conveyances.

Current Actions: TTB is submitting this information collection for extension purposes only, and there are no changes to the collection. However, due to continued growth in the number of distilled spirits plants, TTB is increasing the number of reported respondents to this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 3,160.
- *Average Responses per Respondent:* 1 per year.
- *Number of Responses:* 3,160.
- *Average Per-response and Total Burden:* None. (The placing of the signs and marks identifying DSP premises, structures, equipment, and bulk conveyances is a usual and customary business practice undertaken by DSP proprietors, regardless of any regulatory requirement to do so. Therefore, per the OMB regulations at 5 CFR 1320.3(b)(2), there is no burden associated with the collection of such usual of customary business information.)

OMB Control No. 1513–0084

Title: Labeling of Sulfites in Alcohol Beverages.

Abstract: The U.S. Food and Drug Administration (FDA) has determined that sulfating agents are human allergens that can have serious health implications for persons who are allergic to sulfites, particularly asthmatics, and, as a result, FDA regulations require food labels to declare the presence of sulfites if there are 10 parts per million (ppm) or more of a sulfating agent in a finished food product. Under the FAA Act at 27 U.S.C. 205(e), the Secretary is authorized to issue regulations requiring alcohol beverage labels to provide ''adequate information'' to consumers regarding the identity and quality of such products. Under that authority and consistent with FDA's food labeling requirements, the TTB alcohol beverage labeling regulations in 27 CFR part 4 (wine), part 5 (distilled spirits), and part 7 (beer) require a declaration of sulfites on the labels of alcohol beverages released from domestic bottling premises or customs custody when sulfites are present in such products at levels of 10 or more ppm. This label disclosure is necessary to protect sulfite-sensitive consumers from products that could be potentially harmful to them.

Current Actions: There are no changes to this information collection, and TTB is submitting it for extension purposes only. However, TTB is increasing the number of reported respondents, responses, and burden hours associated with this information collection due to continued growth in the number of alcohol beverage producers and importers, as well as continued growth in the number of alcohol products subject to this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 24,700.
- *Average Responses per Respondent:* 1 (on occasion).
- *Number of Responses:* 24,700.
- *Average Per-response Burden:* 40 minutes.
- *Total Burden:* 16,467 hours.

Dated: May 15, 2019.

Amy R. Greenberg,

Director, Regulations and Rulings Division.

[FR Doc. 2019–10547 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case ID VENEZUELA–16048]

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the name of a person whose property and interests in property has been unblocked and who has been removed from OFAC's List of Specially Designated Nationals and Blocked Persons.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List (SDN List) and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action

On May 7, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person, which had been blocked pursuant to section 1(a)(ii)(C) of Executive Order 13692, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela,'' was no longer blocked, and removed the person from the SDN List.

Individual

1. CRISTOPHER FIGUERA, Manuel Ricardo, Caracas, Capital District, Venezuela; DOB 08 Nov 1963; Gender Male; Cedula No. 8375799 (Venezuela) (individual) [VENEZUELA].

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10486 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–EO13850–15912, VENEZUELA–15923]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On April 17, 2019, OFAC determined that [the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individual

1. RUZZA TERAN, Iliana Josefa (Latin: RUZZA TERÁN, Iliana Josefa), Caracas, Venezuela; DOB 27 Feb 1980; Gender Female; Cedula No. 14310920 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of Executive Order 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela'' (E.O. 13692), as amended by Executive Order 13857 (E.O. 13857) of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela,'' (E.O. 13857) for being a current or former official of the Government of Venezuela.

Entity

1. BANCO CENTRAL DE VENEZUELA (a.k.a. CENTRAL BANK OF VENEZUELA), Av. Urdaneta, Esquina Las Carmelitas, Edif. Banco Central, Caracas, Venezuela; Av. Urdaneta, Esquina de Carmelitas, Distrito Capital, Caracas 1010, Venezuela; SWIFT/BIC BCVEVECA; Tax ID No. G200001100 (Venezuela) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 (E.O. 13850) of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by E.O. 13857, for operating in the financial sector of the Venezuelan economy.

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10490 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–EO13850–15685, VENEZUELA–EO13850–15811, VENEZUELA–EO13850–15814]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. Additionally, OFAC is publishing the names of persons whose property and interests in property have been unblocked. OFAC is also publishing an update to the identifying information of persons currently included in the SDN List.

DATES: See **SUPPLEMENTARY INFORMATION SECTION**.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

A. On March 19, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individual

1. PERDOMO MATA, Adrian Antonio, Miranda, Venezuela; DOB 16 Sep 1969; Gender Male; Cedula No. 10540241 (Venezuela) (individual) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 (E.O. 13850) of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857, ''Taking Additional Steps to Address the National Emergency with Respect to Venezuela,'' of January 25, 2019, for operating in the gold sector of the Venezuelan economy.

Entity

1. MINERVEN (a.k.a. COMPANIA GENERAL DE MINERIA DE VENEZUELA; a.k.a. CORPORACION VENEZOLANA DE GUAYANA MINERVEN C.A.; a.k.a. CVG COMPANIA GENERAL DE MINERIA DE VENEZUELA CA; a.k.a. CVG MINERVEN), Via principal Carapal, El Callao, Bolivar, Venezuela; Zona Industrial Caratal, El Callao, Bolivar, Venezuela; National ID No. J006985970 (Venezuela) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857, ''Taking Additional Steps to Address the National Emergency with Respect to Venezuela,'' of January 25, 2019, for operating in the gold sector of the Venezuelan economy.

B. On March 19, 2019, OFAC removed from the SDN List the persons listed below, whose property and interests in property were blocked pursuant to section 1(a)(ii) of E.O. 13850.

Individuals

1. PERDOMO ROSALES, Maria Alexandra (a.k.a. DE PERDOMO, Maria A; a.k.a. DE PERDOMO, Maria Alejandra; a.k.a. PERDOMO, Maria Alexandra; a.k.a. PERDOMO–ROSALES, Maria), 144 Isla Dorada Blvd., Coral Gables, FL 33146, United States; 4100 Salzedo Street, Apt 1010, Miami, FL 33146, United States; DOB 25 Mar 1972; citizen Venezuela; Gender Female; Cedula No. 10538067 (Venezuela); Passport 135278046 (Venezuela) expires 14 Oct 2020; alt. Passport 079280833 (Venezuela) expires 22 Oct 2018; alt. Passport 018516885 (Venezuela) expires 04 Dec 2013 (individual) [VENEZUELA–EO13850] (Linked To: GORRIN BELISARIO, Raul).

2. TARASCIO–PEREZ, Mayela Antonina (a.k.a. DE PERDOMO, Mayela T; a.k.a. DE PERDOMO, Mayela Tarascio; a.k.a.

TARASCIO DE PERDOMO, Mayela A; a.k.a. TARASCIO DE PERDOMO, Mayela Antonina; a.k.a. TARASCIO, Mayela; a.k.a. TARASCIO–PEREZ, Mayela), 4100 Salzedo St., Unit 804, Coral Gables, FL 33146, United States; DOB 20 Feb 1985; citizen Venezuela; Gender Female; Passport 083111668 (Venezuela) expires 28 Jan 2019; alt. Passport 023639818 (Venezuela) expires 13 Jun 2014; alt. Passport C1453352 (Venezuela) expires 02 Nov 2009 (individual) [VENEZUELA–EO13850] (Linked To: PERDOMO ROSALES, Gustavo Adolfo).

C. On March 19, 2019, OFAC updated the SDN List for the following entities, whose property and interests in property continue to be blocked under the relevant sanctions authority listed below.

Entities

1. CONSTELLO INC., Saint Kitts and Nevis [VENEZUELA–EO13850] (Linked To: PERDOMO ROSALES, Gustavo Adolfo).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, PERDOMO ROSALES, Gustavo Adolfo, a person whose property and interests in property are blocked pursuant to E.O. 13850.

2. CONSTELLO NO. 1 CORPORATION, 4100 Salzedo Street, Unit 804, Coral Gables, FL 33146, United States; DE, United States [VENEZUELA–EO13850] (Linked To: PERDOMO ROSALES, Gustavo Adolfo).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, PERDOMO ROSALES, Gustavo Adolfo, a person whose property and interests in property are blocked pursuant to E.O. 13850.

3. MAGUS HOLDINGS USA, CORP., 4100 Salzedo St., Unit 804, Coral Gables, FL 33146, United States [VENEZUELA–EO13850] (Linked To: PERDOMO ROSALES, Gustavo Adolfo).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, PERDOMO ROSALES, Gustavo Adolfo, a person whose property and interests in property are blocked pursuant to E.O. 13850.

4. RIM GROUP INVESTMENTS I CORP., 4100 Salzedo Street, Apt 1010, Miami, FL 33146, United States; 4100 Salzedo Street, Unit 608, Coral Gables, FL 33146, United States; 4100 Salzedo Street, Unit 807, Coral Gables, FL 33146, United States [VENEZUELA–EO13850] (Linked To: GORRIN BELISARIO, Raul).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, GORRIN BELISARIO, Raul, a person whose property and interests in property are blocked pursuant to E.O. 13850.

5. RIM GROUP INVESTMENTS II CORP., 4100 Salzedo Street, Apt 1010, Miami, FL 33146, United States; 4100 Salzedo Street, Unit 813, Coral Gables, FL 33146, United States; 4100 Salzedo Street, Unit 913, Coral Gables, FL 33146, United States [VENEZUELA–EO13850] (Linked To: GORRIN BELISARIO, Raul).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, GORRIN BELISARIO, Raul, a person whose property and interests in property are blocked pursuant to E.O. 13850.

6. RIM GROUP INVESTMENTS III CORP., 4100 Salzedo Street, Apt 1010, Miami, FL 33146, United States; 144 Isla Dorada Blvd., Coral Gables, FL 33143, United States [VENEZUELA–EO13850] (Linked To: GORRIN BELISARIO, Raul).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, GORRIN BELISARIO, Raul, a person whose property and interests in property are blocked pursuant to E.O. 13850.

7. RIM GROUP INVESTMENTS, CORP., 4100 Salzedo Street, Apt 1010, Coral Gables, FL 33146, United States [VENEZUELA–EO13850] (Linked To: GORRIN BELISARIO, Raul).

Designated pursuant to section 1(a)(iv) of E.O. 13850 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, GORRIN BELISARIO, Raul, a person whose property and interests in property are blocked pursuant to E.O. 13850.

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10494 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–EO13850–15909, VENEZUELA–EO13850–15911, VENEZUELA–EO13850–15919, VENEZUELA–EO13850–15914]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons and vessels that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons and these vessels are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On April 12, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and the following vessels subject to U.S. jurisdiction are blocked under the relevant sanctions authorities listed below.

Entities

1. LIMA SHIPPING CORPORATION (a.k.a. LIMA SHIPPING CORP), 80 Broad Street, Monrovia, Liberia; Identification Number IMO 4063640 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857, ''Taking Additional Steps to Address the National Emergency with Respect to Venezuela,'' of January 25, 2019 (''E.O. 13850''), for operating in the oil sector of the Venezuelan economy.

2. LARGE RANGE LIMITED, 80 Broad Street, Monrovia, Liberia; Identification Number IMO 6002286 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850 for operating in the oil sector of the Venezuelan economy.

3. PB TANKERS S.P.A. (a.k.a. PB TANKERS SPA), Via Principe di Belmonte 55, Palermo PA 90139, Italy; Via Jacopo Peri 1, Rome RM 00198, Italy; website *www.pbtankers.com;* Email Address *info@pbtankers.com;* Identification Number IMO 5161787 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850 for operating in the oil sector of the Venezuelan economy.

4. JENNIFER NAVIGATION LIMITED (a.k.a. JENNIFER NAVIGATION LTD.), 80 Broad Street, Monrovia, Liberia; Identification Number IMO 4098018 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850 for operating in the oil sector of the Venezuelan economy.

Vessels

1. NEW HELLAS Crude Oil Tanker Greece flag; Vessel Registration Identification IMO 9221891 (vessel) [VENEZUELA–EO13850] (Linked To: LIMA SHIPPING CORPORATION).

Identified pursuant to E.O. 13850 as property in which LIMA SHIPPING CORPORATION, a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

2. S–TROTTER Oil Products Tanker Panama flag; Vessel Registration Identification IMO 9216547 (vessel) [VENEZUELA–EO13850] (Linked To: LARGE RANGE LIMITED).

Identified pursuant to E.O. 13850 as property in which LARGE RANGE LIMITED, a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

3. IRON POINT Chemical/Oil Tanker Malta flag; Vessel Registration Identification IMO 9388209 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

4. ALBA MARINA Floating Storage Tanker Italy flag; Vessel Registration Identification IMO 9151838 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

5. GOLD POINT Chemical/Oil Tanker Malta flag; Vessel Registration Identification IMO 9506693 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

6. ICE POINT Chemical/Oil Tanker Italy flag; Vessel Registration Identification IMO 9379337 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

7. INDIAN POINT Chemical/Oil Tanker Malta flag; Vessel Registration Identification IMO 9379325 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

8. SILVER POINT Chemical/Oil Tanker Malta flag; Vessel Registration Identification IMO 9510462 (vessel) [VENEZUELA–EO13850] (Linked To: PB TANKERS S.P.A.).

Identified pursuant to E.O. 13850 as property in which PB TANKERS S.P.A., a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

9. NEDAS Crude Oil Tanker Greece flag; Vessel Registration Identification IMO 9289166 (vessel) [VENEZUELA–EO13850] (Linked To: JENNIFER NAVIGATION LIMITED).

Identified pursuant to E.O. 13850 as property in which JENNIFER NAVIGATION LIMITED, a person whose property and interested in property are blocked pursuant to E.O. 13850, has an interest.

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10489 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–15915, VENEZUELA–15974]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On April 26, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. ARREAZA MONTSERRAT, Jorge Alberto (a.k.a. ARREAZA, Jorge), Caracas, Capital District, Venezuela; DOB 06 Jun 1973; Gender Male; Cedula No. 11945178 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of Executive Order 13692 of March 8, 2015, ''Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela'' (E.O. 13692), as amended by Executive Order 13857 of January 25, 2019, ''Taking Additional Steps To Address the National Emergency With Respect to Venezuela,'' (E.O. 13857) for being a current or former official of the Government of Venezuela.

2. PADILLA DE ARRETURETA, Carol Bealexis, Caracas, Capital District, Venezuela; DOB 19 Feb 1972; Gender Female; Cedula No. 11763586 (Venezuela) (individual) [VENEZUELA].

Designated pursuant to section 1(a)(ii)(C) of E.O. 13692, as amended by E.O. 13857, for being a current or former official of the Government of Venezuela.

Dated: May 10, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10491 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–EO13850–15916, VENEZUELA–EO13850–15920]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is: (1) Providing notice of the sectoral determination by the Secretary of the Treasury pursuant to Executive Order 13850 (''Blocking Property of Additional Persons Contributing to the Situation in Venezuela''), as amended; and (2) publishing the names of one or more persons and vessels that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons and these vessels are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

Sectoral Determination by the Secretary of the Treasury Pursuant to E.O. 13850

On May 10, 2019, the Secretary of the Treasury made the following determination:

Section 1(a) of E.O. 13850 of November 1, 2018 (''Blocking Property of Additional Persons Contributing to the Situation in Venezuela'') (E.O. 13850), as amended by Executive Order 13857 of January 25, 2019 (''Taking Additional Steps To Address the National Emergency With Respect to Venezuela'') (E.O. 13857), imposes economic sanctions on any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to operate in such sectors of the Venezuelan economy as may be determined, pursuant to section 1(a)(i) of E.O. 13850, as amended, by the Secretary of the Treasury, in consultation with the Secretary of State.

To further address the extraordinary threat to the national security and foreign policy of the United States described in E.O. 13850, as amended, and in consultation with the Secretary of State, I hereby determine that section 1(a)(i) shall apply to the defense and security sector of the Venezuelan economy. Any person I or my designee subsequently determine, in consultation with the Secretary of State, operates in this sector shall be subject to sanctions pursuant to section 1(a)(i).

Blocking of Property and Interests in Property Pursuant to E.O. 13850

On May 10, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and the following vessels subject to U.S. jurisdiction are blocked under the relevant sanctions authorities listed below.

Entities

1. MONSOON NAVIGATION CORPORATION, Trust Company Complex, Ajeltake Road, Ajeltake Island, Majuro MH96960, Marshall Islands; Identification Number IMO 5403673 [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 (E.O. 13850) of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857 (E.O. 13857), ''Taking Additional Steps To Address the National Emergency with Respect to Venezuela,'' of January 25, 2019, for operating in the oil sector of the Venezuelan economy.

2. SERENITY MARITIME LIMITED (a.k.a. SERENITY MARITIME LTD.; a.k.a. SERENITY MARITIME LTD–LIB), Broad Street 80, Monrovia 1000, Liberia [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of E.O. 13850, as amended by E.O. 13857, for operating in the oil sector of the Venezuelan economy.

Vessels

1. OCEAN ELEGANCE Crude Oil Tanker Panama flag; Vessel Registration Identification IMO 9038749 (vessel) [VENEZUELA–EO13850] (Linked To: MONSOON NAVIGATION CORPORATION).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which MONSOON NAVIGATION CORPORATION, a person whose property and interested in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, has an interest.

2. LEON DIAS Chemical/Oil Tanker Panama flag; Vessel Registration Identification IMO 9396385 (vessel) [VENEZUELA–EO13850] (Linked To: SERENITY MARITIME LIMITED).

Identified pursuant to E.O. 13850, as amended by E.O. 13857, as property in which SERENITY MARITIME LIMITED, a person whose property and interested in property are blocked pursuant to E.O. 13850, as amended by E.O. 13857, has an interest.

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10485 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

[Case IDs VENEZUELA–EO13850–15818, VENEZUELA–EO13850–15819]

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is: (1) Providing notice of the sectoral determination by the Secretary of the Treasury pursuant to Executive Order 13850 (''Blocking Property of Additional Persons Contributing to the Situation in Venezuela''), as amended (E.O. 13850); and (2) publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: OFAC: Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

Sectoral Determination by the Secretary of the Treasury Pursuant to E.O. 13850

On March 22, 2019, the Secretary of the Treasury made the following determination:

Section 1(a) of E.O. 13850 of November 1, 2018 (''Blocking Property of Additional Persons Contributing to the Situation in Venezuela'') (E.O. 13850), as amended by Executive Order 13857 of January 25, 2019 (''Taking Additional Steps to Address the National Emergency With Respect to Venezuela'') (E.O. 13857), imposes economic sanctions on any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to operate in such sectors of the Venezuelan economy as may be determined, pursuant to section 1(a)(i) of E.O. 13850, by the Secretary of the Treasury, in consultation with the Secretary of State.

To further address the extraordinary threat to the national security and foreign policy of the United States

described in E.O. 13850, as amended by E.O. 13857, and in consultation with the Secretary of State, I hereby determine that section 1(a)(i) shall apply to the financial sector of the Venezuelan economy. Any person I or my designee subsequently determine, in consultation with the Secretary of State, operates in this sector shall be subject to sanctions pursuant to section 1(a)(i).

Blocking of Property and Interests in Property Pursuant to E.O. 13850

On March 22, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following person are blocked under the relevant sanctions authority listed below.

Entities

1. BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA (a.k.a. BANCO BANDES; a.k.a. BANDES; f.k.a. FONDO DE INVERSIONES DE VENEZUELA), Av. Universidad, Esq. de Traposos a Colon, P–1, Torre BANDES, CARACAS, DISTRITO FEDERAL 1010, Venezuela; Edificio Fondo de Inversiones de Venezuela Avenida Norte 1, Esquina Colon a Traposos, Caracas, Venezuela; SWIFT/BIC FIVV VE CA; National ID No. G200047526 (Venezuela) [VENEZUELA–EO13850].

Designated pursuant to section 1(a)(i) of Executive Order 13850 (E.O. 13850) of November 1, 2018, ''Blocking Property of Additional Persons Contributing to the Situation in Venezuela,'' as amended by Executive Order 13857 (E.O. 13857) of January 25, 2019, ''Taking Additional Steps to Address the National Emergency with Respect to Venezuela,'' for operating in the financial sector of the Venezuelan economy.

2. BANCO BANDES URUGUAY S.A. (a.k.a. BANDES URUGUAY), Zabala 1338, Montevideo 11000, Uruguay; SWIFT/BIC CFACUYMM; National ID No. 215395820015 (Uruguay) [VENEZUELA–EO13850] (Linked To: BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA).

Designated pursuant to section 1(a)(iv) of E.O. 13850, as amended by E.O. 13857, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA (BANDES).

3. BANCO BICENTENARIO DEL PUEBLO, DE LA CLASE OBRERA, MUJER Y COMUNAS, BANCO UNIVERSAL C.A. (f.k.a. BANCO BICENTENARIO BANCO UNIVERSAL C.A.; a.k.a. BANCO BICENTENARIO DEL PUEBLO; a.k.a. BANCO BICENTENARIO DEL PUEBLO, DE LA CLASE OBRERA, MUJER Y COMUNAS, BANCO UNIVERSAL CA), Av Venezuela, Torre Banco Bicentenario, P.P, El Rosal, Caracas, Distrito Capital, Venezuela; SWIFT/BIC COND VE CP; National ID No. G200091487 (Venezuela) [VENEZUELA–EO13850] (Linked To: BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA).

Designated pursuant to section 1(a)(iv) of E.O. 13850, as amended by E.O. 13857, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, BANDES.

4. BANCO DE VENEZUELA SA BANCO UNIVERSAL (a.k.a. BANCO DE VENEZUELA; a.k.a. BANCO DE VENEZUELA SA, BANCO UNIVERSAL; f.k.a. BANCO DE VENEZUELA, S.A.; a.k.a. BANCO DE VENEZUELA, S.A.C.A.), Av Universidad Esq. de Sociedad, Torre Banco de Venezuela, Caracas, Distrito Federal, Venezuela; SWIFT/BIC VZLA VE CA; National ID No. G200099976 (Venezuela) [VENEZUELA–EO13850] (Linked To: BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA).

Designated pursuant to section 1(a)(iv) of E.O. 13850, as amended by E.O. 13857, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, BANDES.

5. BANCO PRODEM SA (f.k.a. FONDO FINANCIERO PRIVADO PRODEM S.A.), Calle Belisario Salinas No 520, esquina, Sanchez Lima, La Paz, La Paz, Bolivia; SWIFT/BIC BPRM BO LP; Tax ID No. 1029837028 [VENEZUELA–EO13850] (Linked To: BANCO DE DESARROLLO ECONOMICO Y SOCIAL DE VENEZUELA).

Designated pursuant to section 1(a)(iv) of E.O. 13850, as amended by E.O. 13857, for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, BANDES.

Dated: May 15, 2019.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2019–10492 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0377]

Agency Information Collection Activity under OMB Review: Claim for Repurchase of Loan

AGENCY: Loan Guaranty Service, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Loan Guaranty Service, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 6, 2019.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0377'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Danny Green, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov.* Please refer to ''OMB Control No. 2900–0377'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–21.

Title: Claim for Repurchase of Loan, VA Form 26–8084, or include form numbers in the

OMB Control Number: 2900–0377.

Type of Review: Extension without change of a currently approved collection.

Abstract: Under 38 CFR 36.4600(d), the holder of a delinquent vendee account is legally entitled to repurchase of the loan by VA when the loan has been continuously in default for 3 months and the amount of the delinquency equals or exceeds the sum of 2 monthly installments. When requesting the repurchase of a loan, the holder uses VA Form 26–8084. Upon receipt of a holder's VA Form 26–8084, the supporting documents are examined to see that all of the documents required have been submitted and that they are sufficient to complete the repurchase. VA Form 26–8084 is compared with the settlement sheet prepared when the loan was sold and examined closely to establish that there are no errors in the holder's methods of computation for repurchase. Following repurchase by VA, the obligor(s) are notified in writing that VA has repurchased the loan, and the vendee account is serviced and maintained by VA thereafter.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 7971 on March 6, 2019, pages 7971–7972.

Affected Public: Individuals or Households.

Estimated Annual Burden: 5 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 10.

By direction of the Secretary.

Danny Green,

VA Interim Clearance Officer, Office of Quality, Performance, Privacy and Risk (OQPR), Department of Veterans Affairs.

[FR Doc. 2019–10534 Filed 5–20–19; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0358]

Agency Information Collection Activity: Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct, or Progress

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs

ACTION: Notice

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 20, 2019.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0358'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Danny S. Green at (202) 421–1354.

SUPPLEMENTARY INFORMATION:

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct, or Progress, VA Form 22–8873.

OMB Control Number: 2900–0358.

Type of Review: Reinstatement without change of a previously approved collection.

Abstract: Students use the VA Form 22–8873 to change programs of education or to notify VA that they are making unsatisfactory progress in their programs of education. VA uses the information provided from the current collection to ensure (1) that programs are suitable to a claimant's aptitudes, interests, and abilities and (2) that the cause of any past unsatisfactory attendance, progress, or conduct has been resolved. Without this information, VA could not determine further entitlement to education benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 5813 on February 22, 2019, pages 5813 and 5814.

Affected Public: Individual and households.

Estimated Annual Burden: 8,860 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Annual.

Estimated Number of Respondents: 17,720.

By direction of the Secretary.

Danny S. Green,

VA Interim Clearance Officer, Office of Quality Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2019–10530 Filed 5–20–19; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0216]

Agency Information Collection Activity Under OMB Review: Application for Accrued Amounts Due a Deceased Beneficiary

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before June 20, 2019.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0216'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Danny S. Green at (202) 421–1354.

SUPPLEMENTARY INFORMATION:

Authority: 38 U.S.C. 1521.

Title: Application for Accrued Amounts Due a Deceased Beneficiary, VA Form 21P–601.

OMB Control Number: 2900–0216.

Type of Review: Extension without change of a currently approved collection.

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services established by law for veterans, service personnel, and their dependents and/or beneficiaries. Information is requested by this form under the authority of 38 U.S.C. 5121, which provides the eligibility criteria for the payment of accrued benefits. VA regulated the eligibility criteria 38 CFR 3.1000 through 3.1010.

VA Form 21P–601 is used to gather the information necessary to determine a claimant's entitlement to accrued benefits. Accrued benefits are amounts of VA benefits due, but unpaid, to a beneficiary at the time of his or her death. Benefits are paid to eligible survivors based on the priority described in 38 U.S.C. 5121(a). When there are no eligible survivors entitled to accrued benefits based on their relationship to the deceased beneficiary, the person or persons who bore the expenses of the beneficiary's last illness and burial may claim reimbursement for these expenses from accrued amounts.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 7183 on March 1, 2019, pages 7183 and 7184.

Affected Public: Individuals or Households.

Estimated Annual Burden: 7,920 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 15,840.

By direction of the Secretary.

Danny S. Green,

VA Interim Clearance Officer, Office of Quality, Performance, and Risk, Department of Veterans Affairs.

[FR Doc. 2019–10529 Filed 5–20–19; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 84 Tuesday,
No. 98 May 21, 2018

Part II

Department of Health and Human Services

45 CFR Part 88
Protecting Statutory Conscience Rights in Health Care; Delegations of Authority; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 88

RIN 0945–AA10

Protecting Statutory Conscience Rights in Health Care; Delegations of Authority

AGENCY: Office for Civil Rights (OCR), Office of the Secretary, HHS.

ACTION: Final rule.

SUMMARY: The United States has a long history of providing protections in health care for individuals and entities on the basis of religious beliefs or moral convictions. Congress has passed many such laws applicable to the Department of Health and Human Services (''HHS'' or the ''Department'') and the programs or activities it funds or administers, some of which are the subject of existing HHS regulations. This final rule revises existing regulations to ensure vigorous enforcement of Federal conscience and anti-discrimination laws applicable to the Department, its programs, and recipients of HHS funds, and to delegate overall enforcement and compliance responsibility to the Department's Office for Civil Rights (''OCR''). In addition, this final rule clarifies OCR's authority to initiate compliance reviews, conduct investigations, supervise and coordinate compliance by the Department and its components, and use enforcement tools otherwise available in existing regulations to address violations and resolve complaints. In order to ensure that recipients of Federal financial assistance and other Department funds comply with their legal obligations, this final rule requires certain recipients to maintain records; cooperate with OCR's investigations, reviews, or other proceedings; and submit written assurances and certifications of compliance to the Department. The final rule also encourages the recipients of HHS funds to provide notice to individuals and entities about their right to be free from coercion or discrimination on account of religious beliefs or moral convictions.

DATES: This rule is effective July 22, 2019.

FOR FURTHER INFORMATION CONTACT: Sarah Bayko Albrecht at (800) 368–1019 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is also available from the **Federal Register** online database through *http://www.govinfo.gov,* a service of the U.S. Government Publishing Office.

I. Background

This document adopts as final, with changes in response to public comments, a revised part 88, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority. This preamble to the final rule provides a brief background of the rule, summarizes the final rule provisions, and discusses in detail the comments received on the proposed rule.[1]

A. Statutory History

The freedoms of conscience and of religious exercise are foundational rights protected by the Constitution and numerous Federal statutes. Congress has acted to protect these freedoms with particular force in the health care context, and it is these laws that are the subject of this final rule. Specifically, this final rule concerns Federal laws that provide:

- Conscience protections related to abortion, sterilization, and certain other health services applicable to the Department of Health and Human Services and recipients of certain Federal funds encompassed by 42 U.S.C. 300a–7 (the ''Church Amendments'');
- Conscience protections for health care entities related to abortion provision or training, referral for such abortion or training, or accreditation standards related to abortion (the ''Coats-Snowe Amendment,'' 42 U.S.C. 238n);
- Protections from discrimination for health care entities that do not provide, pay for, provide coverage of, or refer for abortions under programs funded by the Department's appropriations acts (*e.g.,* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Public Law 115–245, 132 Stat. 2981 (Sept. 28, 2018) (the ''Weldon Amendment''); *id.,* sec. 209);
- Protections from discrimination under the Patient Protection and Affordable Care Act (''ACA'') for health care entities that do not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing, applicable to the Federal Government and any State or local government that receives Federal financial assistance (42 U.S.C. 18113); and conscience protections for providers, organizations, or their employees regarding counseling regarding the same (42 U.S.C. 14406(1));
- Conscience protections regarding exemptions applicable to the ACA's individual mandate (26 U.S.C. 5000A; 42 U.S.C. 18081);
- Conscience protections under the ACA for qualified health plans related to coverage of abortion, and for individual health care providers and health care facilities that do not provide, pay for, provide coverage of, or refer for abortions (42 U.S.C. 18023(b)(1)(A) and (b)(4));
- Conscience protections for Medicare Advantage organizations and Medicaid managed care organizations with moral or religious objections to counseling or referral for certain services (42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B));
- Conscience protections related to the performance of advanced directives (42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406(2));
- Conscience and nondiscrimination protections for organizations related to Global Health Programs, to the extent such funds are administered by the Secretary of HHS (the ''Secretary'') (22 U.S.C. 7631(d));
- Conscience protections attached to Federal funding, to the extent such funding is administered by the Secretary, regarding abortion and involuntarily sterilization (22 U.S.C. 2151b(f), *see, e.g.,* the Consolidated Appropriations Act, 2019, Pub. L. 116–6, Div. F, sec. 7018 (the ''Helms, Biden, 1978, and 1985 Amendments''));
- Conscience protections from compulsory health care or services generally (42 U.S.C. 1396f and 5106i(a)), and under specific programs for hearing screening (42 U.S.C. 280g–1(d)), occupational illness testing (29 U.S.C. 669(a)(5)); vaccination (42 U.S.C. 1396s(c)(2)(B)(ii)), and mental health treatment (42 U.S.C. 290bb–36(f)); and
- Protections for religious nonmedical health care providers and their patients from certain requirements under Medicare and Medicaid that may burden their exercise of their religious beliefs regarding medical treatment (*e.g.,* 42 U.S.C. 1320a–1(h), 1320c–11, 1395i–5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j–1(b)).

For purposes of this final rule, these laws will be collectively referred to as ''Federal conscience and anti-discrimination laws.''

Congress has recognized that modern health care practices may give rise to conflicts with the religious beliefs and moral convictions of payers, providers, and patients alike. The existence of

[1] 83 FR 3880 (Jan. 26, 2018).

moral and ethical objections on the part of health care clinicians about participating in, assisting with, referring for, or otherwise being complicit in certain procedures is well documented by ethicists.[2] Religious institutions and entities, too, have expressed objections to the provision of or participation in insurance coverage for certain procedures or services, such as abortion, sterilization, and assisted suicide. To address these problems, Congress has repeatedly legislated conscience protections for individuals and institutions providing health care to the American public, as outlined below.

The Church Amendments. The Church Amendments were enacted at various times during the 1970s in response to debates over whether judicially recognized rights to abortions, sterilizations, or related practices might lead to the requirement that individuals or entities participate in activities to which they have religious or moral objections. The Church Amendments consist of five provisions, codified at 42 U.S.C. 300a–7, that protect those who hold religious beliefs or moral convictions regarding certain health care procedures from discrimination by entities that receive certain Federal funds, and in health service programs and research activities funded by HHS. Notably, the Church Amendments contain provisions explicitly protecting the rights of both individuals and entities.

First, paragraph (b) of the Church Amendments provides, with regard to individuals, that no court, public official, or other public authority can use an individual's receipt of certain Federal funding as grounds to require the individual to perform, or assist in, sterilization procedures or abortions, if doing so would be contrary to his or her religious beliefs or moral convictions. 42 U.S.C. 300a–7(b)(1). Paragraph (b) further prohibits those public authorities from requiring an entity, based on the entity's receipt of Federal funds under certain HHS programs, (1) to permit sterilizations or abortions in the entity's facilities if the performance of such procedures there violates the entity's religious beliefs or moral convictions, or (2) to make its personnel available for such procedures if contrary to the personnel's religious beliefs or moral convictions. 42 U.S.C. 300a–7(b)(2). The individuals and entities protected by this provision are recipients of grants, contracts, loans, or loan guarantees under the Public Health Service Act (42 U.S.C. 201 *et seq.*), and those entities' personnel.[3]

Second, paragraph (c)(1) of the Church Amendments applies to decisions on employment, promotion, or termination of employment, as well as extension of staff or other privileges with respect to physicians and other health care personnel. 42 U.S.C. 300a–7(c)(1). This paragraph prohibits certain entities from discriminating in these decisions based on an individual declining to perform or assist in an abortion or sterilization because of that individual's religious beliefs or moral convictions. 42 U.S.C. 300a–7(c)(1). It also prohibits those entities from discriminating in such decisions based on an individual's performance of a lawful abortion or sterilization procedure, or on an individual's religious beliefs or moral convictions about such procedures more generally. *Id.* Like paragraph (b), any recipients of a grant, contract, loan, or loan guarantee under the Public Health Service Act must comply with paragraph (c)(1).

Third, paragraph (c)(2) of the Church Amendments applies to the recipients of the Department's grants or contracts for biomedical or behavioral research under any program administered by the Secretary. 42 U.S.C. 300a–7(c)(2). This paragraph prohibits discrimination by such entity against physicians or other health care personnel in employment, promotion, or termination of employment, as well as discrimination in the extension of staff or other privileges, because of an individual's performance or assistance in any lawful health service or research activity, declining to perform or assist in any such service or activity based on religious beliefs or moral convictions, or the individual's religious beliefs or moral convictions respecting such services or activities more generally. 42 U.S.C. 300a–7(c)(2).

Fourth, paragraph (d) of the Church Amendments applies to any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary. For these health service programs or research activities, no individual shall be required to perform or assist in the performance of any part of the program or research activity if doing so would be contrary to his or her religious beliefs or moral convictions. 42 U.S.C. 300a–7(d).

Fifth, paragraph (e) of the Church Amendments applies to health care training or study programs, including internships and residencies. Paragraph (e) prohibits any entity receiving certain funds from denying admission to, or otherwise discriminating against, applicants for training or study based on the applicant's reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to, or consistent with, the applicant's religious beliefs or moral convictions. 42 U.S.C. 300a–7(e). Any recipient of a grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*) must comply with paragraph (e).

The Coats-Snowe Amendment. Enacted in 1996, section 245 of the Public Health Service Act (also known as the ''Coats-Snowe Amendment'' or ''Coats-Snowe'') applies nondiscrimination requirements to the Federal government, and to State or local governments receiving Federal financial assistance. 42 U.S.C. 238n. Such governments may not discriminate against any health care entity that refuses to undergo training in, require or provide training in, or perform abortions; refer for abortions or abortion training; or make arrangements for any of those activities. 42 U.S.C. 238n(a)(1)–(2). Furthermore, those governments may not discriminate against a health care entity because the entity attends or attended a health care training program that does not (or did not) perform abortions; require, provide, or refer for training in the performance of abortions; or make arrangements for any such training. 42 U.S.C. 238n(a)(3). The law defines the term ''health care entity'' as including (and, therefore, not limited to) an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions. 42 U.S.C. 238n(c)(2).

[2] *See, e.g.,* Farr A. Curlin M.D., et al., *Religion, Conscience, and Controversial Clinical Practices,* New Eng. J. Med. 593–600 (2007); Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine,* 2013 Int'l. J. Family Med. 1, 9 (2013); Harris, et al., *Obstetrician–Gynecologists' Objections to and Willingness to Help Patients Obtain an Abortion* 118 Obstet. & Gyn. 905 (2011); Armand H. Matheny Antommaria, *Adjudicating Rights or Analyzing Interests: Ethicists' Role in the Debate Over Conscience in Clinical Practice,* 29 Theor. Med. Bioeth. 201, 206 (2008); William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine,* 17 J. Contemp. Health L. & Pol'y 455, 529 (2001); Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty,* 34 J.L. Med. & Ethics 570 (2006).

[3] The Church Amendments also reference the Community Mental Health Centers Act, Public Law 88–164, 77 Stat. 282 (1963), and the Developmental Disabilities Services and Facilities Construction Amendments of 1970, Public Law 91–517, 84 Stat. 1316 (1970). However, those statutes were repealed by subsequent statute and, accordingly, are not referenced here.

In addition, Coats-Snowe applies to accreditation of postgraduate physician training programs. Therefore, the Federal government, and State or local governments receiving Federal financial assistance, may not deny a legal status (including a license or certificate) or financial assistance, services, or other benefits to a health care entity based on an applicable physician training program's lack of accreditation due to the accrediting agency's requirements that a health care entity perform induced abortions; require, provide, or refer for training in the performance of induced abortions; or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. 42 U.S.C. 238n(b)(1). Additionally, the statute requires the government involved to formulate regulations or other mechanisms, or enter into agreements with accrediting agencies, as are necessary to comply with this accreditation provision of Coats-Snowe. *Id.*

The Weldon Amendment. The Weldon Amendment (or ''Weldon'') was originally adopted in 2004 and has been readopted (or incorporated by reference) in each subsequent appropriations act for the Departments of Labor, Health and Human Services, and Education. *See, e.g.,* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B., sec. 507(d). Weldon provides that none of the funds made available in the applicable Labor, HHS, and Education appropriations act be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. *E.g.,* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B., sec. 507(d). Weldon states that the term ''health care entity'' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan. *Id.*

Conditions on Federally Appropriated Funds Requiring Compliance with Federal Conscience and Anti-Discrimination Laws. In addition to Weldon, current appropriations acts include other health care conscience protections. For example, one provision, using language similar to the Weldon Amendment, prohibits the Department from denying participation in Medicare Advantage to an otherwise eligible entity, such as a provider-sponsored organization, because the entity informs the Secretary it will not provide, pay for, provide coverage of, or provide referrals for abortions. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B, sec. 209, 132 Stat. 2981.

The Patient Protection and Affordable Care Act's Conscience and Associated Anti-Discrimination Protections. Passed in 2010, the Patient Protection and Affordable Care Act (ACA) also includes several conscience and associated anti-discrimination protections.

Section 1553 of the ACA prohibits the Federal government, and any State or local government or health care provider that receives Federal financial assistance under the ACA, or any ACA health plans, from discriminating against an individual or institutional health care entity because of the individual or entity's objection to providing any health care items or service for the purpose of causing or assisting in causing death, such as by assisted suicide, euthanasia, or mercy killing. 42 U.S.C. 18113. Section 1553 designates OCR to receive complaints of discrimination on that basis. *Id.*

Section 1303 declares that the ACA does not require health plans to provide coverage of abortion services as part of ''essential health benefits for any plan year.'' 42 U.S.C. 18023(b)(1)(A). Furthermore, no qualified health plan offered through an ACA exchange may discriminate against any individual health care provider or health care facility because of the facility or provider's unwillingness to provide, pay for, provide coverage of, or refer for abortions. 42 U.S.C. 18023(b)(4). And section 1303 of the ACA makes clear that nothing in that Act should be construed to undermine Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion. 42 U.S.C. 18023(c)(2)(A)(i)–(iii). Qualified health plans, as defined under 42 U.S.C. 18021, offered on any Exchange created under the ACA, are required to comply with § 88.3(f)(2)(i) and (ii), which faithfully applies the plain text of section 1303 of the ACA. 42 U.S.C. 18023.

Finally, under section 1411 of the ACA, 42 U.S.C. 18081, HHS is responsible for issuing certifications to individuals who are entitled to an exemption from the individual responsibility requirement imposed under Internal Revenue Code sec. 5000A, including when such individuals are exempt based on a hardship (such as the inability to secure affordable coverage without abortion),[4] are members of an exempt religious organization or division,[5] or participate in a ''health care sharing ministry.'' [6] *See also* 26 U.S.C. 5000A(d)(2). Under section 1311(d)(4)(H) of the ACA, 42 U.S.C. 18031(d)(4)(H), health benefit exchanges are responsible for issuing certificates of exemption consistent with the Secretary's determinations under section 1411 of the ACA.

Other Protections Related to the Performance of Advance Directives or Assisted Suicide. Before passage of section 1553 of the ACA, Congress had passed other conscience protections related to assisted suicide. Section 7 of the Assisted Suicide Funding Restriction Act of 1997 (Pub. L. 105–12, 111 Stat. 23) clarified that the Patient Self-Determination Act's provisions stating that Medicare and Medicaid beneficiaries have certain self-determination rights do not (1) require any provider, organization, or any employee of such provider or organization participating in the Medicare or Medicaid program to inform or counsel any individual about a right to any item or service furnished for the purpose of causing or assisting in causing the death of such individual, such as assisted suicide, euthanasia, or mercy killing; or (2) apply to or affect

[4] *See* Guidance on Hardship Exemptions from the Individual Shared Responsibility Provision for Persons Experiencing Limited Issuer Options or Other Circumstances, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services (CMS), April 9, 2018. *https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2018-Hardship-Exemption-Guidance.pdf.* As discussed in the description of § 88.3(g) below, Congress reduced the penalty in 26 U.S.C. 5000A for a lack of minimum essential coverage to $0. SUPPORT for Patients and Communities Act, Public Law 115–271, section 4003, 26 U.S.C. 5000A(d)(2) (2018).

[5] Organizations that are religiously exempt include those with established tenets or teachings in opposition to acceptance of the benefits of any private or public insurance. 26 U.S.C. 1402(g)(1).

[6] A ''health care sharing ministry'' is an organization, described in section 501(c)(3) and taxed under section 501(a) of the Internal Revenue Code, comprising members who share a common set of ethical or religious beliefs and who share medical expenses among members in accordance with those beliefs without regard to the State in which a member resides or is employed. 26 U.S.C. 5000A(d)(2)(B).

any requirement with respect to a portion of an advance directive that directs the purposeful causing of, or assistance in causing, the death of an individual, such as by assisted suicide, euthanasia, or mercy killing. 42 U.S.C. 14406 (by cross-reference to 42 U.S.C. 1395cc(f) (Medicare) and 1396a(w) (Medicaid)); *see also* 42 U.S.C. 1395cc(f)(4) (by cross-reference to 42 U.S.C. 14406); 1396a(w)(3), 1396a(a)(57); 1396b(m)(1)(A); and 1396r(c)(2)(E).[7] Those protections extend to Medicaid and Medicare providers, such as hospitals, skilled nursing facilities, home health or personal care service providers, hospice programs, Medicaid managed care organizations, health maintenance organizations, Medicare+Choice (now Medicare Advantage) organizations, and prepaid organizations.

Protections Related to Counseling and Referrals Under Medicare Advantage Plans, Medicaid Plans, and Managed Care Organizations. Certain Federal protections prohibit organizations offering Medicare+Choice (now Medicare Advantage) plans and Medicaid managed care organizations from being compelled under certain circumstances to provide, reimburse for, or cover, any counseling or referral service in plans over an objection on moral or religious grounds. 42 U.S.C. 1395w–22(j)(3)(B) (Medicare+Choice); 42 U.S.C. 1396u–2(b)(3)(B) (Medicaid managed care organization). Department regulations provide that this conscience provision for managed care organizations also applies to prepaid inpatient health plans and prepaid ambulatory health plans under the Medicaid program. 42 CFR 438.102(a)(2).

Federal Conscience and Anti-Discrimination Protections Applying to Global Health Programs. The Department administers certain programs under the President's Emergency Plan for AIDS Relief (PEPFAR), to which additional conscience protections apply. Specifically, recipients of foreign assistance funds for HIV/AIDS prevention, treatment, or care authorized by section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2), 22 U.S.C. 7601–7682, or under any amendment made by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 (Pub. L. 110–293), cannot be required, as a condition of receiving such funds, (1) to ''endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS,'' or (2) to ''endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection.'' 22 U.S.C. 7631(d)(1)(B). The government also cannot discriminate against such recipients in the solicitation or issuance of grants, contracts, or cooperative agreements for the recipients' refusal to do any such actions. 22 U.S.C. 7631(d)(2).

Exemptions from Compulsory Medical Screening, Examination, Diagnosis, or Treatment. This rule incorporates four statutory provisions that protect parents who, on the basis of conscience, object to their children being forced to receive certain treatments or health interventions. First, under the Public Health Service Act, certain suicide prevention programs are not to be construed to require ''suicide assessment, early intervention, or treatment services for youth'' if their parents or legal guardians have religious or moral objections to such services. 42 U.S.C. 290bb–36(f); section 3(c) of the Garrett Lee Smith Memorial Act (Pub. L. 108–355, 118 Stat. 1404, reauthorized by Pub. L. 114–255 at sec. 9008). Second, authority to issue certain grants through the Health Resources and Services Administration (HRSA), Centers for Disease Control and Prevention (CDC), and the National Institutes of Health (NIH) may not be construed to preempt or prohibit State laws which do not require hearing loss screening for newborn, infants or young children whose parents object to such screening based on religious beliefs. 42 U.S.C. 280g–1(d). Third, certain State and local child abuse prevention and treatment programs funded by HHS are not to be construed as creating a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of that parent or legal guardian. 42 U.S.C. 5106i(a). Fourth, in providing pediatric vaccines funded by Federal medical assistance programs, providers must comply with any State laws relating to any religious or other exemptions. 42 U.S.C. 1396s(c)(2)(B)(ii).

Conscience Clauses Related to Religious Nonmedical Health Care. Since 1965, Congress has provided accommodations in Medicare and Medicaid for persons and institutions objecting to the acceptance or provision of medical care or services based on a belief in a religious method of healing through approval of religious nonmedical health care institutions (RNHCIs). RNHCIs do not provide standard medical screenings, examination, diagnosis, prognosis, treatment, or the administration of medications. 42 U.S.C. 1395x(ss)(1). Instead, RNHCIs furnish nonmedical items and services such as room and board, unmedicated wound dressings, and walkers,[8] and they provide care exclusively through nonmedical nursing personnel assisting with nutrition, comfort, support, moving, positioning, ambulation, and other activities of daily living.[9]

Congress has acknowledged RNHCIs through several statutes. For example, although such institutions would not otherwise meet the medical criteria for Medicare providers, *see* 42 U.S.C. 1395x(e) (definition of ''hospital''), 1395x(y)(1) (definition of ''skilled nursing facility''), 1395x(k), and 1320c–11 (exemptions from other medical criteria and standards), Congress expressly included them within the definition of designated Medicare providers. Congress prohibited States from excluding RNHCIs from licensure through implementation of State definitions of ''nursing home'' and ''nursing home administrator,'' 42 U.S.C. 1396g(e), and Congress exempted RNHCIs from certain Medicaid requirements for medical criteria and standards. 42 U.S.C. 1396a(a) (exempting RNHCIs from 42 U.S.C. 1396a(a)(9)(A), 1396a(a)(31), 1396a(a)(33), and 1396b(i)(4)). Finally, Congress permitted patients at RNHCIs to file an election with HHS stating that they are ''conscientiously opposed to acceptance of'' medical treatment, that is neither received involuntarily nor required under Federal or State law or the law of a political subdivision of a State, on the basis of ''sincere religious beliefs,'' yet remain eligible for the nonmedical care and services ordinarily covered under Medicare, Medicaid, and CHIP. *See, e.g.,* 42 U.S.C. 1395x(e), 1395x(y), and 1395i–5 (Medicare provisions). Federal courts have upheld the constitutionality of such religious accommodations. *See, e.g., Kong* v. *Scully,* 341 F.3d 1132 (9th Cir. 2003); *Children's Healthcare* v. *Min De Parle,* 212 F.3d 1084 (8th Cir. 2000).

[7] Similar protections exist under the Department's regulations applicable to hospitals, nursing facilities, and other medical facilities, *See, e.g.,* 42 CFR 489.102(c)(2); Medicare Advantage, 42 CFR 422.128(b)(2)(ii); and Medicare Health Maintenance Organizations and Comprehensive Medical Plans, 42 CFR 417.436 (such organizations, plans, and their agents are not required to implement advance directives if the provider cannot do so ''as a matter of conscience'' and State law allows such conscientious objection).

[8] *https://www.medicare.gov/coverage/rnhci-items-and-services.html.*

[9] *https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/Certificationand Complianc/RNHCIs.html.*

Congress has also provided particular accommodations for persons and institutions that object to medical services and items. Section 6703(a) of the Elder Justice Act of 2009 (Pub. L. 111–148, 124 Stat. 119) provides that Elder Justice and Social Services Block Grant programs may not interfere with or abridge an elder person's ''right to practice his or her religion through reliance on prayer alone for healing,'' when the preference for such reliance is contemporaneously expressed, previously set forth in a living will or similar document, or unambiguously deduced from such person's life history. 42 U.S.C. 1397j–1(b). Additionally, the Child Abuse Prevention and Treatment Act (CAPTA) specifies that it does not require (though it also does not prevent) a State finding of child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with religious beliefs. 42 U.S.C. 5106i(a)(2).

B. Regulatory History

The Department engaged in rulemaking to enforce some of these Federal conscience and anti-discrimination laws on previous occasions: In the 2008 final rule at 45 CFR part 88 (the ''2008 Rule,'' 73 FR 78072, 78074 (Dec. 19, 2008)), in the revocation and replacement of that Rule in 2011 (the ''2011 Rule''), and in existing CMS regulations at 42 CFR parts 422 and 438, which implement 1395w–22(j)(3)(b) and 1396u–2(b)(3)(B), respectively.[10] This section of the preamble briefly summarizes the first two actions.

2008 Rule. The Department issued a notice of proposed rulemaking in 2008 to enforce, and clarify the applicability of, the Church, Coats-Snowe, and Weldon Amendments. 73 FR 50274 (Aug. 26, 2008) (August 2008 Proposed Rule). That proposed rule recognized (1) inconsistent awareness of Federal conscience and anti-discrimination protections among federally funded recipients and protected persons and entities; and (2) the need for greater enforcement mechanisms to ensure that Department funds do not support morally coercive or discriminatory policies or practices in violation of Federal law.

The Department received a ''large volume'' of comments on the August 2008 Proposed Rule. *See* 73 FR at 78074. Comments came from a wide variety of individuals and organizations, including private citizens, individual and institutional health care providers, religious organizations, patient advocacy groups, professional organizations, universities and research institutions, consumer organizations, and State and Federal agencies and representatives. Comments dealt with a range of issues surrounding the proposed rule, including whether the rule was needed, what individuals would be protected by the proposed rule, what services would be covered by the proposed rule, whether health care workers would use the regulation to discriminate against patients, what significant implementation issues could be associated with the rule, what legal arguments could be made for and against the rule, and what cost impacts of the proposed rule could be anticipated. Many comments confirmed the need to promulgate a regulation to raise awareness of Federal conscience and anti-discrimination protections and provide for their enforcement.

The Department responded to those substantive comments and issued a final rule on December 19, 2008, codifying the rule at 45 CFR part 88 (''2008 Rule''), which consisted of six sections:

Section 88.1 stated that the purpose of the 2008 Rule was ''to provide for the implementation and enforcement'' of the Church, Coats-Snowe, and Weldon Amendments. It specified that those Amendments and the implementing regulations ''[we]re to be interpreted and implemented broadly to effectuate their protective purposes.''

Section 88.2 of the 2008 Rule defined several terms used in part 88 and applicable to various provider nondiscrimination protections, namely, the terms ''Assist in the Performance,'' ''Entity,'' ''Health Care Entity,'' ''Health Service Program,'' ''Individual,'' ''Instrument,'' ''Recipient,'' ''Sub-recipient,'' and ''Workforce.''

Section 88.3 of the 2008 Rule set forth the scope of applicability of the sections and paragraphs of part 88 as they related to each conscience law implemented in the 2008 Rule.

Section 88.4 of the 2008 Rule set forth the substantive requirements and applications of the Church, Coats-Snowe, and the Weldon Amendments.

Section 88.5 of the 2008 Rule required covered federally funded entities to provide written certification of compliance with the laws encompassed by the 2008 Rule.

Section 88.6 of the 2008 Rule designated HHS OCR to receive complaints based on the three specified Federal conscience and anti-discrimination laws, and directed OCR to coordinate handling those complaints with the Departmental components from which the covered entity receives funding.

Proposed Changes in 2009 Resulting in New Final Rule in 2011. On March 10, 2009, with the advent of a new Administration, the Department proposed to rescind, in its entirety, the 2008 Rule. 74 FR 10207 (Mar. 10, 2009) (2009 Proposed Rule). The Department declared that certain comments on the August 2008 Proposed Rule raised a number of questions warranting further review of the 2008 Rule to ensure its consistency with that Administration's policy. The Department invited further comments to reevaluate the necessity for regulations implementing the Federal conscience and anti-discrimination laws. In response to the proposal to rescind the 2008 Rule, for which the Department received supporting comments, the Department also received comments stating that health care workers should not be required to violate their religious beliefs or moral convictions; expressing concern that health care providers would be coerced into violating their consciences; and identifying the 2008 Rule as protecting First Amendment religious freedom rights, the capacity to uphold the tenets of the Hippocratic Oath, and the ethical integrity of the medical profession. Numerous commenters identified concerns that there would be no regulatory scheme to protect the legal rights afforded to health care providers, including medical students. 76 FR 9968, 9971 (Feb. 23, 2011) (2011 Rule).

On February 23, 2011, the Department rescinded most of the 2008 Rule and finalized a new rule. 76 FR 9968. The 2011 Rule left in place section ''88.1 Purpose,'' but removed the word ''implementation,'' describing the 2011 Rule's purpose as ''provid[ing] for the enforcement'' of the Church, Coats-Snowe, and Weldon Amendments. It then removed the 2008 Rule's sections 88.2 through 88.5, redesignated the 2008 Rule's § 88.6 as § 88.2, and modified that section to consist of two sentences, stating that OCR is designated to receive complaints based on the Federal health care provider conscience protection statutes, and will coordinate the handling of complaints with the Departmental funding component(s) from which the entity with respect to which a complaint has been filed, receives funding.

The preamble to the 2011 Rule stated, ''The Department supports clear and strong conscience protections for health care providers who are opposed to performing abortions.'' 76 FR at 9969. The Department recognized, ''The

[10] For instance, the prohibition against coercion in 42 U.S.C. 1395w–22(j)(3) (section 1852 of the Social Security Act) is regulated within the Medicare Program at 42 CFR 422.206(b), (d).

comments received suggested that there is a need to increase outreach efforts to make sure providers and grantees are aware of these statutory protections. It is also clear that the Department needs to have a defined process for health care providers to seek enforcement of these protections.'' 76 FR at 9969. Accordingly, the summary of the 2011 Rule stated that ''enforcement of the Federal statutory health care provider conscience protections will be handled by the Department's Office for Civil Rights, in conjunction with the Department's funding components.'' 76 FR at 9968. The Department announced that OCR was beginning to lead ''an initiative designed to increase the awareness of health care providers about the protections provided by the health care provider conscience statutes, and the resources available to providers who believe their rights have been violated.'' 76 FR at 9969. The 2011 Rule provided that OCR would ''collaborate with the funding components of the Department to determine how best to inform health care providers and grantees about health care conscience protections, and the new process for enforcing those protections.'' *Id.*

II. Overview of the Final Rule

A. Overview of Reasons for the Final Rule

After reviewing the previous rulemakings, comments from the public, and OCR's enforcement activities, the Department has concluded that there is a significant need to amend the 2011 Rule to ensure knowledge of, compliance with, and enforcement of, Federal conscience and anti-discrimination laws. The 2011 Rule created confusion over what is and is not required under Federal conscience and anti-discrimination laws and narrowed OCR's enforcement processes. Since November 2016, there has been a significant increase in complaints filed with OCR alleging violations of the laws that were the subject of the 2011 Rule, compared to the time period between the 2009 proposal to repeal the 2008 Rule and November 2016. The increase underscores the need for the Department to have the proper enforcement tools available to appropriately enforce all Federal conscience and anti-discrimination laws.[11]

Allegations and Evidence of Discrimination and Coercion Have Existed Since the 2008 Rule and Increased Over Time. The 2008 Rule sought to address an environment of discrimination toward, and attempted coercion of, those who object to certain health care procedures based on religious beliefs or moral convictions.[12] Yet in February 2009, the Department announced its intent to rescind the 2008 Rule just one month after its effective date.[13] It completed that rescission in 2011, despite significant evidence of an environment of discrimination and coercion, including thousands of public comments during the rulemakings that led to the 2008 and 2011 Rules describing that environment. For example, a 2009 article in the *New England Journal of Medicine* argued, ''Qualms about abortion, sterilization, and birth control? Do not practice women's health.'' [14] In a 2009 survey of 2,865 members of faith-based medical associations, 39% reported having faced pressure or discrimination from administrators or faculty based on their moral, ethical, or religious beliefs.[15] Additionally, 32% of the survey respondents reported having been pressured to refer a patient for a procedure to which they had moral, ethical, or religious objections. Some 20% of medical students in that poll said that they would not pursue a career in obstetrics or gynecology because of perceived discrimination and coercion in that specialty against their beliefs. In total, 91% of respondents reported that they ''would rather stop practicing medicine altogether than be forced to violate [their] conscience.''

Comments received during the rulemaking that led to the 2011 Rule were consistent with this survey. Multiple commenters reported that some hospitals had forced health care providers to sign affidavits agreeing to participate in abortions if asked.[16] One obstetrician/gynecologist commented that he had been pressured to participate in abortions and abortion counseling during his entire time in health care—from medical school, through his residency, and during private practice.[17] Medical and nursing students, in twenty-five comments, expressed their reluctance to enter the health care field as a whole, and particularly specialties such as obstetrics, family medicine, and elder care, where their objections to abortion or euthanasia might not be respected.[18] At least ninety commenters said that, if forced to choose between their careers or violating their conscience, they would quit their jobs.[19] Tens of

[11] Since 2011, conscience and coercion in health care have been the subjects of significant litigation at the State and local level. Recently, the Supreme Court held that the State of California likely violated the Free Speech rights of prolife pregnancy resource centers that do not provide information about where to obtain abortions by adopting a statute that required them, among other things, to post notices to which they objected. *See Nat'l Inst. of Family and Life Advocates* v. *Becerra,* 138 S. Ct. 2361 (Jun. 26, 2018).

[12] 73 FR at 78073.

[13] Rob Stein, ''Obama Plans to Roll Back 'Conscience' Rule Protecting Health Care Of Workers Who Object to Some Types of Care,'' The Washington Post (Feb. 28, 2009) *http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701104.html* (writing that ''The administration's plans, revealed quietly with a terse posting on a Federal website, unleashed a flood of heated reaction'').

[14] Julie D. Cantor, M.D., J.D., ''Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine,'' 360 New England J. Med. 1484–85 (April 9, 2009).

[15] The Polling Company, Inc./WomanTrend, Highlights of The Polling Company, Inc. Phone Survey of the American Public, fielded March 31, 2009 through April 3, 2009), *https://www.cmda.org/library/doclib/pollingsummaryhandout.pdf* (last visited Jan. 18, 2018); *see also* Public Comment from Jonathan Imbody, Christian Medical Association, (''CMA Comment''), available at *https://www.regulations.gov/document?D=HHS-OCR-2018-0002-64461.*

[16] Comment Nos. HHS–OPHS–2009–0001–0739, –52648, –52677.

[17] Comment No. HHS–OPHS–2009–0001–0868.

[18] Comment Nos. HHS–OPHS–2009–0001–0026, –1035, –10522, –12117, –14427, –34439, –11404 (''future physician'' concerned about shortages), –35236 (granddaughter entering the medical profession will change career path), –11579 (son entering the medical profession), –14435 (concerned mother of medical student), –18783 (spoke to student who is distraught and may leave), –5571, –41431 (sister is a medical student), –5638, –0068, –1791 (student would quit job), –2750 (exacerbates healthcare issues), –5255 (opposed and has used exemption), –7058, –7276, –7671, –5270 (has already seen others leave the profession over pressure for their beliefs), –5638, –5566 (nurse who chose not to specialize in obstetrics and gynecology for fear of pressure), –5566 (nurse who chose not to enter obstetrics and gynecology because of pressure to perform abortions).

[19] Almost 90 comments are cited here, but this is merely a sample of the total. *See* Comment Nos. HHS–OPHS–2009–0001–0540, –0017, –0264, –0350, –0356, –0485, –0540, –0880, –0881, –0902, –0917, –0932, –10154, –15148, –20381 (woman in California whose daughter is a nurse), –23290 (already left the profession), –32951, –9188, –47007 (patient's doctor said he would retire), –14287, –19128, –9873, –29603 (physician stating many will retire), –50498 (patient's doctor said he would retire), –27384, –44458, –18837, –14216, –18015, –18015, –34140 (already retired but would have retired earlier), –32593, –15341, –14837, –8582, –16541, –11579 (patient's doctor said he would retire), –0229, –51896 (children would be forced to leave), –32009 (other physicians will be driven out), –10280 (physician with objections), –19029, –33116, –50663, –3675, –24456, –11327, –19221, –34888 (nurse saying others will leave), –14535 (daughter will leave the profession), –21679 (four members in the family who may leave), –0283, –0340, –0905, –9272, –0055 (will give up serving underserved population), –10862 (two sisters who are nurses will leave, hospital shut down), –17401, –29674 (son who is a physician will be forced out), –26795 (physician who says doctors will be forced out), –25742, –49731, –15087, –13138, –17563, –0006 (refuse to accept violation of beliefs in practice), –0815, –7665, –8091, –2598 (private family physician who intentionally avoided obstetrics because it was made clear that ''pro-life candidates need not apply''; also cites strong pressure in universities and organizations in favor of abortion provision, and is concerned physicians

Continued

thousands of comments to the 2009 proposed rule expressed concern that, without robust enforcement of Federal conscience and anti-discrimination laws, individuals with conscientious objections simply would not enter the health care field, or would leave the profession, and hospitals would shut down, contributing to the shortage of health care providers or affecting the quality of care provided.[20] Thousands also feared personnel with objections would be terminated or otherwise unable to find employment, training, or opportunities to advance in their fields.[21]

Commenters also identified a culture of hostility to conscience concerns in health care.[22] Some expressed concern that the rescission of the 2008 Rule would contribute to these problems by inappropriately politicizing, and interfering in, the practice of medicine and individual providers' judgment.[23] Thousands of comments from medical personnel stated their disagreement with the rescission, often stating that they had requested exemptions in the past and were concerned rescission would make it harder to request exemptions in the future.[24] Hundreds of commenters expressed concern over the exclusion and marginalization of health care entities and employees holding religious beliefs or moral convictions, and fears that the moral agency of the medical profession was eroding.[25]

According to news reports, in 2010, Nassau University Medical Center disciplined eight nurses when they raised objections to assisting in the performance of abortions.[26] Nurses in Illinois and New York filed lawsuits against private hospitals alleging they had been coerced to participate in abortions. *Mendoza* v. *Martell,* No. 2016–6–160 (Ill. 17th Jud. Cir. June 8, 2016); *Cenzon-DeCarlo* v. *Mount Sinai Hosp.,* 626 F.3d 695 (2d Cir. 2010). A nurse-midwife in Florida alleged she had been denied the ability to apply for a position at a federally qualified health center due to her objections to prescribing hormonal contraceptives. *Hellwege* v. *Tampa Family Health Ctrs.,* 103 F. Supp. 3d 1303 (M.D. Fla. 2015). Twelve nurses in New Jersey sued a public hospital over a policy allegedly requiring them to assist in abortions and for disciplining one nurse who raised a conscientious objection to the same. Complaint, *Danquah* v. *University of Medicine and Dentistry of New Jersey,* No. 2:11–cv–6377 (D.N.J. Oct. 31, 2011). Many religious health care personnel and faith-based medical entities have further alleged that health care personnel are being targeted for their religious beliefs.[27]

In 2016, the American Congress of Obstetricians and Gynecologists (ACOG) reaffirmed a prior ethics opinion that recommended, ''Physicians and other health care professionals have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that their patients request,'' and ''In resource-poor areas . . . [p]roviders with moral or religious objections should either practice in proximity to individuals who do not share their views or ensure that referral processes are in place so that patients have access to the service that the physician does not wish to provide.'' [28]

Public comments received on the proposed rule published in January 2018 shared additional anecdotes of coercion, discriminatory conduct, or other actions potentially in violation of Federal conscience and anti-discrimination laws. Commenters also shared their assessments of the knowledge, or lack thereof, among the general public, health care field, health care insurance industry, and employment law field of the rights and obligations that this rule implements and enforces. Examples are detailed in the Regulatory Impact Analysis as part of the Department's analysis under Executive Orders 12,866 and 13,563 regarding the need for this rule.

Recently Enacted State and Local Government Health Care Laws and Policies Have Resulted in Numerous Lawsuits by Conscientious Objectors. The Department has also witnessed an increase in lawsuits against State and local laws that plaintiffs allege violate conscience or unlawfully discriminate. For example, many State and local governments have enacted legislation requiring health care providers offering pregnancy resources as an alternative to abortion to post notices related to abortion, to which plaintiffs objected on First Amendment and analogous grounds. The Supreme Court held that California's version of such a law likely violated the First Amendment free speech rights of centers that object to abortion in *National Institute of Family and Life Advocates* v. *Becerra,* No. 16–1140, 585 U.S. ____, 138 S. Ct. 2361 (Jun. 26, 2018) (''*NIFLA*'').[29]

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will leave the practice more), –3564, –0199, –5230 (discrimination already present), –6603, –1397 (nurse who has been forced to do things against her conscience in the past before the 2008 Rule came into effect, and who will quit if put in that scenario again), –1100 (nurse who says others will leave the practice), –6669, –0272, –0925, –0125, –4668, –6709, –7900, –2544, –3535, –1852, –7684, –1381.

[20] Comment Nos. HHS–OPHS–2009–0001–20613, –43039, –27699, –42804, –6001, –10850, –27147, –50621, –52878, –19586, –40775, –4824, 27384, –11138, –52997, –53001, –4460, –12878, –12575, –43364, –27262, –42942, –26426, –38158, –43672, –52381, –32173, –16541, –19751, –2697, –52935, –6369, –44571, –53022, –48387, –21990, –50837, –42069, –14662, –51974, –45449, –17364, –5370, –2922, –15005, –18783, –23376, –50685, –17401, –52946, –11206, –33828, –38997, –3925, –21036, –50894, –27155, –10529, –47113, –7266, –22291, –4016, –0204, –8788, –25608, –52932, –39199, –12340, –52950 (form letter with 1,916 copies), –31897, –52984 (form letter with 62 copies), –53081 (form letter with 22 copies), –52968 (form letter with 9,532 copies), –52961 (patients concerned about access to pro-life doctors: Form letter with 3,272 copies), –53098 (patients concerned effort to push people out: Form letter with 976 copies), –52977 (form letter with 3,516 copies), –53021 (form letter with 4,842 copies), –52949 (form letter with 688 copies), –53039 (form letter with 742 copies), –0476.

[21] Comment Nos. HHS–OPHS–2009–0001–0558, –10144, –53026 (claims documentation of unaddressed discrimination), –52985 (claims documentation of unaddressed discrimination), –52960 (claims documentation of unaddressed discrimination), –52735 (lack of knowledge about rights), –53048 (evidence of discrimination), –53047 (evidence of discrimination: Form letter with 3,196 copies), –52960 (evidence of discrimination: Form letter with 1,685 copies), –53028 (evidence of discrimination: Form letter with 2,002 copies).

[22] Comment Nos. HHS–OPHS–2009–0001–0739, –52677, –26812, –53013 (form letter with 8,472 copies).

[23] Comment No. HHS–OPHS–2009–0001–10280, –2486, –46903, –19125, –36940, –12020, –41551.

[24] Comment Nos. HHS–OPHS–2009–0001–3107, –15617, –19496, –27506, –9586, –35721, –49748, –1650, –19965, –18365, –23095, –6332, –3405, –1762, –4395, –4569, –6890, –0729, –0943, –1490, –2994, –3248, –3419, –5341, –6479, –7079, –4525, –7093, –2486, –2039, –7750, –6270, –1903, –3293, –3405, –1127, –5505, –1823, –4939, –5881, –4529, –5829, –1773, –2220, –2345, –3089, –7163, –7471, –3840, –0389, –1933, –3493, –3088, –5088, –5702.

[25] Comment Nos. HHS–OPHS–2009–0001–52974 (form letter with 428 copies).

[26] *LI Hospital issues abortion apology to nurses,* N.Y. Post (Apr. 28, 2010), *http://nypost.com/2010/04/28/li-hospital-issues-abortion-apology-to-nurses.*

[27] *See, e.g., Roman Catholic Diocese of Albany* v. *Vullo,* No. 02070–16 (N.Y. Albany County S. Ct. May 4, 2016); *Means* v. *U.S. Conference of Catholic Bishops,* No. 1:15–CV–353, 2015 WL 3970046 (W.D. Mich. 2015); *ACLU* v. *Trinity Health Corporation,* 178 F. Supp. 3d 614 (E.D. Mich. 2016); *Minton* v. *Dignity Health,* No. 17–558259 (Calif. Super. Ct. Apr. 19, 2017); *Chamorro* v. *Dignity Health,* No. 15–549626 (Calif. Super. Ct. Dec. 28, 2015). *See also* U.S. Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Services (Nov. 17, 2009) (identifying Catholic objections to performing abortions, tubal ligations, and hysterectomies).

[28] *https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine* (reaffirming ACOG, ''The Limits of Conscientious Refusal in Medicine,'' Committee Opinion No. 385, 110 Obstet Gyn. 1479 (2007)) The 2007 ACOG opinion had, at least in part, prompted the 2008 Rule. Then-HHS Secretary Leavitt wrote to ACOG and the American Board of Obstetrics and Gynecology (ABOG) and noted that the interaction between the ACOG opinion and ABOG certification requirements could constitute a violation of Federal conscience and anti-discrimination laws.

[29] On January 18, 2019, OCR issued a Notice of Violation to the State of California for OCR Complaint Nos. 16–224756 and 18–292848, finding that California's version of such a law violated the

Courts have also enjoined similar ordinances in New York City; Austin, Texas; Montgomery County, Maryland; Baltimore, Maryland; Illinois; and Hawaii. *Greater Baltimore Center for Pregnancy Concerns, Inc.* v. *Mayor and City Council of Baltimore,* 879 F.3d 101, 105 (4th Cir. 2018), *cert. denied,* 138 S. Ct. 2710, (2018) (holding that Baltimore ordinance requiring pregnancy resource center to State abortion services are not available in their facilities violated the Free Speech Clause); *Evergreen Ass'n, Inc.* v. *City of New York,* 740 F.3d 233 (2d Cir. 2014) (affirming an injunction, based on the First Amendment, of ordinance provisions requiring disclosures about whether pregnancy resource centers refer for abortion and conveying city health department's recommendation to consult a licensed medical provider); *Austin LifeCare* v. *City of Austin,* No. 1:11–cv–00875–LY (W.D. Tex. Jun. 23, 2014) (permanently enjoining enforcement of ordinance as void for vagueness); *Centro Tepeyac* v. *Montgomery County,* 5 F. Supp. 3d 745 (D. Md. Mar. 7, 2014) (applying strict scrutiny in finding that ordinance violated pregnancy resource center's First Amendment rights); *Pregnancy Care Center of Rockford* v. *Rauner,* No. 2016–MR–741 (Ill. 17th Jud. Cir. Dec. 20, 2016) (preliminary injunction entered on free speech grounds); *Prelim. Inj., Nat'l Instit. of Family and Life Advocates* v. *Rauner,* No. 3:16–cv–50310 (N.D. Ill. Sept. 29, 2016) (preliminary injunction entered on free speech grounds); *Calvary Chapel Pearl Harbor* v. *Chin,* No. 1:17–cv–00326–DKW–KSC (D. Haw. Sept. 20, 2018) (permanent injunction and final judgment).

Before *NIFLA,* several courts had rejected challenges to California's law. *See, e.g., Mountain Right to Life* v. *Harris,* No. 5:16–cv–00119 (C.D. Cal. July 8, 2016) (denying preliminary injunction); *A Woman's Friend Pregnancy Resource Clinic* v. *Harris,* 153 F. Supp. 3d 1168 (E.D. Cal. Dec. 21, 2015); *Livingwell Medical Clinic* v. *Harris,* No. 3:15–cv–04939, 2015 WL 13187682 (N.D. Cal. Dec. 18, 2015).

Some of the plaintiffs in these lawsuits also filed complaints with OCR alleging that the State laws violate the Weldon, Coats-Snowe, and/or Church Amendments. Complaints filed with OCR against the State of California, alleging California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) (Cal. Health & Safety Code Ann. sections 123470, *et seq.*) violated Federal conscience and anti-discrimination laws, were recently resolved with a finding by OCR that the State of California violated the Weldon and Coats-Snowe Amendments.[30] OCR determined that ''California's enactment of the FACT Act violate[d] the Weldon and Coats-Snowe Amendments by discriminating against health care entities that object to referring for, or making arrangements for, abortion.'' [31]

Complaints filed with OCR against the State of Hawaii, alleging Hawaii Revised Statute section 321–561(b)–(c) violated Federal conscience and anti-discrimination laws, were recently satisfactorily resolved when Hawaii Attorney General Clare E. Connors issued a Memorandum to the Department of the Attorney General for the State of Hawaii stating, ''the Department will not enforce section 321–561(b)–(c), HRS, against any limited service pregnancy centers, as defined in section 321–561(a), HRS;'' the memorandum also stated that it ''shall remain in effect indefinitely or until such time as there is a change in the laws discussed above warranting reconsideration.'' [32] In her letter to OCR regarding the Memorandum, Attorney General Connors also said that ''the Department will advise the Hawai'i Legislature of its decision not to enforce section 321–561(b)–(c), HRS, against any limited service pregnancy center.'' [33] Attorney General Connors took appropriate corrective action in Hawaii to assure current and future compliance with the Weldon and Coats-Snowe Amendments, as they apply to Hawaii Revised Statute section 321–561(b)–(c), and the complaints regarding this provision were resolved without having to find Hawaii in violation of Federal conscience and anti-discrimination laws.[34]

Some States have also sought to require health insurance plans to cover abortions, triggering additional conscience-related lawsuits. California, for example, sent a letter to seven insurance companies seeking to enforce a California legal requirement that the insurers include abortion coverage in plans used by persons who objected to such coverage. *See* Letter from California Department of Managed Health Care, *Re: Limitations or Exclusions of Abortion Services* (Aug. 22, 2014) (interpreting State statutes, regulations, and court decisions).[35] The State of California estimates that at least 28,000 individuals subsequently lost their abortion-free health plans, and houses of worship have challenged California's policy in court. *See Foothill Church* v. *Rouillard,* 2:15–cv–02165–KJM–EFB, 2016 WL 3688422 (E.D. Cal. July 11, 2016); *Skyline Wesleyan Church* v. *California Department of Managed Health Care,* No. 3:16–cv–00501–H–DHB (S.D. Cal. 2016). The New York State Department of Financial Services has similarly sought to require individual and small group employers, regardless of the number of employees or any religious affiliation, to provide insurance coverage for abortions, prompting additional lawsuits. *See, e.g., Roman Catholic Diocese of Albany* v. *Vullo,* No. 02070–16 (N.Y. Albany County Sup. Ct. May 4, 2016).

Over the past several years, an increasing number of jurisdictions in the United States have legalized assisted suicide. *See* District of Columbia B21–0038 (Feb. 18, 2017), Colorado Prop. 106 (Dec. 16, 2016); California ABX2–15 (June 9, 2016); 18 Vermont Act 39 (May 20, 2013) (''Act 39''). In Vermont, for example, Act 39 states that health care professionals must inform patients ''of all available options related to terminal care.'' 18 Vt. Stat. Ann. section 5282. When the Vermont Department of Health construed Act 39 to require all health care professionals to counsel for assisted suicide, individual health care professionals and associations of religious health care providers sued Vermont, alleging a violation of their conscience rights. Compl., *Vermont Alliance for Ethical Health Care, Inc.* v. *Hoser,* No. 5:16–cv–205 (D. Vt. Apr. 5, 2017) (dismissed by consent agreement). More recently still, the family of a California cancer patient sued UCSF Medical Center for alleged elder abuse because the cancer patient died after the oncologists on staff declined to participate in assisted suicide, but before she could obtain a new physician.[36]

Weldon and Coats-Snowe Amendments, as discussed *infra.*

[30] Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal. (Jan. 18, 2019), *available at https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.*

[31] *Id. at* 9.

[32] Memorandum from Haw. Att'y. Gen. Clare E. Connors to the Dep't. of the Att'y. Gen., State of Haw. 2 (Mar. 15, 2019) (on file with HHS OCR).

[33] Letter from Haw. Att'y. Gen. Clare E. Connors, to Luis E. Perez, Deputy Dir. of the Conscience & Religious Freedom Div., Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Mar. 15, 2019) (on file with HHS OCR).

[34] Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Clare E. Connors, Att'y. Gen., State of Haw. (Mar. 21, 2019), *available at https://www.hhs.gov/sites/default/files/hawaii-ocr-notice-of-resolution-final.pdf.*

[35] *https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf.*

[36] Bob Egelko, *California's assisted-dying loophole: Some doctors won't help patients die,* San

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Finally, some States have passed laws appearing to require health care professionals to provide referrals for implementation of advance directives without accommodation for religious belief or moral conviction. *See* Iowa Code Ann. section 144D.3(5) (2012) (requiring that providers take ''all reasonable steps to transfer the patient to another health care provider, hospital, or health care facility'' even when there is an objection based on ''religious beliefs, or moral convictions''); Idaho Code Ann. 39–4513(2) (2012) (requiring that a provider ''make[ ] a good faith effort to assist the person in obtaining the services of another physician or other health care provider who is willing to provide care for the person in accordance with the person's expressed or documented wishes'').

Since the Department issued the proposed Conscience Rule in 2018, OCR issued a Notice of Violation to the State of California for OCR Complaint Nos. 16–224756 and 18–292848, finding that California's FACT Act violated the Weldon and Coats-Snowe Amendments, as discussed *supra.* Beyond this finding, in this final rule, the Department does not opine on or judge the legal merits or sufficiency of any of the above-cited lawsuits or challenged laws. They are discussed here to illustrate a notable number of disputes about alleged violations of health care conscience, broadly understood, by State and local governments. They also illustrate the need for greater clarity concerning the scope and operation of the Federal conscience and anti-discrimination laws that are the subject of this final rule. The Department anticipates that this final rule will result in greater public familiarity with Federal conscience and anti-discrimination laws, and may inform both State and local governments and health care institutions of their obligations, and individual and institutional health care entities of their rights, under those laws.

Confusion Exists About the Scope and Applicability of Federal Conscience and Anti-Discrimination Laws. Even though Federal conscience and anti-discrimination laws are currently in effect, the public has sometimes been confused about their applicability in relation to other Federal, State, or local laws. One of the purposes of the 2008 Rule was to address confusion about the interaction between Federal conscience and anti-discrimination laws and other Federal statutes.

For instance, some advocacy organizations have filed lawsuits claiming that Federal or State laws require private religious entities to perform abortions and sterilizations despite the existence of longstanding conscience and anti-discrimination protections on this topic. S*ee Means* v. *U.S. Conference of Catholic Bishops,* No. 1:15–CV–353, 2015 WL 3970046 (W.D. Mich. 2015) (abortion); *ACLU* v. *Trinity Health Corp.,* 178 F.Supp.3d 614 (E.D. Mich. 2016) (abortion); *Minton* v. *Dignity Health,* No. 17–558259 (Cal. Super. Ct. Apr. 19, 2017) (hysterectomy); *Chamorro* v. *Dignity Health,* No. 15–549626 (Cal. Super. Ct. Dec. 28, 2015) (tubal ligation). A patient also sued a secular public hospital for accommodating doctors' and nurses' religious objections to abortion in alleged violation of a State law, Washington's Reproductive Privacy Act. *Coffey* v. *Pub. Hosp. Dist. No. 1,* 20–15–2–00217–4 (Wash. 2015).

Congress has exercised the broad authority afforded to it under the Spending Clause to attach conditions on Federal funds to protect conscience rights. Such conditions override conflicting provisions of State law for States that accept the conditioned funds according to the terms of the statutes applicable to such funding streams. States have long been able to harmonize and comply with other ''cross-cutting'' anti-discrimination laws imposed through such conditions on Federal financial assistance. *See, e.g.,* Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The Department seeks to clarify the scope and application of Federal conscience and anti-discrimination laws in this final rule as it has with other anti-discrimination laws. *See* 45 CFR part 80 (Title VI) and part 86 (Title IX).

Courts Have Found No Alternative Private Right of Action to Remedy Violations. The government, rather than private parties, has the central role in enforcement of Federal conscience and anti-discrimination laws. In lawsuits filed by health care providers for alleged violations of certain of these laws, courts have generally held that such laws do not contain, or imply, a private right of action to seek relief from such violations by non-governmental covered entities. Thus, adequate governmental enforcement mechanisms are critical to the enforcement of these laws.

The case of a New York nurse who alleged that a private hospital forced her to assist in an abortion over her religious objections illustrates the point. The nurse filed a lawsuit in Federal court in 2009, but her case was dismissed on the ground that she did not have a private right to file a civil action against such a hospital under the Church Amendments. *Cenzon-DeCarlo* v. *Mount Sinai Hospital,* 626 F.3d 695 (2d Cir. 2010). The Second Circuit affirmed the dismissal, holding that the Church Amendments ''may be a statute in which Congress conferred an individual right,'' but that Congress *had not implied a remedy* to file suit against private entities in Federal court. *Id.* at 698–99. After the dismissal of the Federal lawsuit, the nurse then filed a case in State court, but that case too was dismissed for lack of a private right of action. *Cenzon-DeCarlo* v. *Mount Sinai Hosp.,* 962 N.Y.S.2d 845 (Sup. Ct. Kings County 2010), *aff'd by* 957 N.Y.S.2d 256 (App. Div. 2012). The nurse then filed a complaint with OCR on January 1, 2011, and OCR resolved the complaint after the hospital changed its written policy for health care professionals.

Similar results occurred in a Federal lawsuit brought by a nurse in 2014, alleging that a health center had violated the Church Amendments when it denied her the ability to apply for a position as a nurse because she objected to prescribing abortifacients. *Hellwege* v. *Tampa Family Health Centers,* 103 F. Supp. 3d 1303 (M.D. Fla. 2015). Like the court in New York, the court held that the Church Amendments ''recognize important individual rights'' but do not confer a remedy to bring suit against a private entity in Federal court. *Id.* at 1310. More recently, a Federal district court in Illinois held that there is no private right of action for a doctor who alleges that the State required her to refer for abortions in violation of the Coats-Snowe Amendment. Order at 4, *Nat'l Instit. of Family and Life Advocates,* v. *Rauner,* No. 3:16–cv–50310 (N.D. Ill. July 19, 2017), ECF No. 65.

In light of these decisions and the increase in conscience-based challenges to State and local laws in the health care context, OCR has a singular and critical responsibility to provide clear and appropriate interpretation of Federal conscience and anti-discrimination laws, to engage in outreach to protected parties and covered entities, to conduct compliance reviews, to investigate alleged violations, and to vigorously enforce those laws.

Addressing Confusion Caused by OCR Sub-Regulatory Guidance. This final rule also resolves confusion caused by sub-regulatory guidance issued through OCR's high-profile closure of three Weldon Amendment complaints against

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Francisco Chronicle (Aug. 12, 2017), *http://www.sfchronicle.com/news/article/California-s-assisted-dying-loophole-Some-11761312.php.*

the State of California filed in 2014.[37] On June 21, 2016, OCR declared it found no violation stemming from California's policy requiring that health insurance plans include coverage for abortion based on the facts alleged in the three complaints it had received.[38] OCR's closure letter concluded that the Weldon Amendment's protection of health insurance plans included issuers of health insurance plans but not institutions or individuals who purchase or are insured by those plans. Even though California's policy resulted in complainants losing abortion-free insurance that was consistent with their beliefs and that insurers were willing to provide, the letter concluded that none qualified as an entity or person protected under the Weldon Amendment because none was an insurance issuer. Relying on an interpretation of legislative history, instead of the Weldon Amendment's text, OCR also declared that health care entities are not protected under Weldon unless they possess a ''religious or moral objection to abortion,'' and concluded that the insurance issuers at issue did not merit protection because they had not raised any religious or moral objections. Finally, OCR called into question its ability to enforce the Weldon Amendment against a State *at all* because, according to the letter, to do so could ''potentially'' require the revocation of Federal funds to California in such a magnitude as to violate State sovereignty and constitute a violation of the Constitution.[39]

The Department does not opine upon, and has not yet made a judgment on, the compatibility of California's policy with the Weldon Amendment. But clarification is in order with respect to the general interpretations of the Weldon Amendment offered in OCR's closure of complaints against California's abortion coverage requirement. The Department has engaged in further consideration of this general matter and has also further reviewed Federal conscience and anti-discrimination laws, their legislative history, and the record of rulemaking and public comments. Based on this review, the Department indicated, in the preamble to the proposed rule, that the above-mentioned sub-regulatory guidance issued by OCR with respect to interpretation of the Weldon Amendment no longer reflects the Department's position on, and interpretation of, the Weldon Amendment. The Department continues to hold the views it expressed on that issue in the preamble to the proposed rule, *see* 83 FR at 3890–91, and has reflected those views in its analysis contained in the Notice of Violation to the State of California for OCR Complaint Nos. 16–224756 and 18–292848, discussed *supra,* in which OCR discussed the rationale behind its determination that ''California's enactment of the FACT Act violate[d] the Weldon . . . Amendment[ ] by discriminating against health care entities that object to referring for, or making arrangements for, abortion.'' [40]

The Department is concerned that segments of the public have been dissuaded from complaining about religious discrimination in the health care setting to OCR as the result, at least in part, of these unduly narrow interpretations of the Weldon Amendment. For example, Foothill Church, located in Glen Morrow, California, expressed concern that filing a complaint with OCR about California's abortion-coverage requirement was pointless because the Department had already closed three similar complaints, finding no violation of Federal conscience and anti-discrimination laws. *See Foothill Church* v. *Rouillard,* No. 2:15–cv–02165–KJM–EFB, 2016 WL 3688422 (E.D. Cal. July 11, 2016).

With this final rule, the Department seeks to educate protected entities and covered entities as to their legal rights and obligations; to encourage individuals and organizations with religious beliefs or moral convictions to enter, or remain in, the health care industry; and to prevent others from being dissuaded from filing complaints due to prior OCR complaint resolutions or sub-regulatory guidance that no longer reflect the views of the Department.

Additional Federal Conscience and Anti-Discrimination Laws. Finally, in addition to all of the concerns discussed above, the Department is using this rulemaking to address various other conscience protection and anti-discrimination laws not discussed in the 2008 and 2011 Rules. Some of these provisions were enacted after 2008. All provide additional protections, such as for health care providers and patients, from coercion and discrimination including that stemming from moral convictions or religious beliefs.

B. Structure of the Final Rule

This final rule generally reinstates the structure of the 2008 Rule, includes further definitions of terms, and provides robust certification and enforcement provisions comparable to provisions found in OCR's other civil rights regulations.This final rule also encourages certain recipients of Federal financial assistance from the Department or of Federal funds from the Department to notify individuals and entities protected under Federal conscience and anti-discrimination laws (such as employees, applicants, or students) of their Federal conscience rights. In addition, this final rule requires certain such entities to assure and certify to the Department their compliance with the requirements of these laws. It also sets forth in more detail the investigative and enforcement responsibility of OCR, along with the tools at OCR's disposal for carrying out its responsibility with respect to these laws.

Congress has imposed obligations on the Department and funding recipients through these statutes, and the Department is, therefore, required to ensure its own compliance and the compliance of its funding recipients. In 2008 and 2011, the Secretary delegated to OCR the authority to receive complaints of discrimination under the Church, Coats-Snowe, and Weldon Amendments, in coordination with Department components that provide Federal financial assistance. Congress later designated OCR as responsible for receiving complaints under section 1553 of the ACA. Many of the remaining statutes that are the subject of the proposed rule do not have any implementing regulations. To the extent not already delegated to OCR, the Secretary is, therefore, delegating to OCR enforcement authority—that is, the authority to receive complaints, and, in consultation and coordination with the funding components of the Department, investigate alleged violations and take appropriate enforcement action—over those additional Federal statutes as well as the statutes covered by the 2008 and 2011 Rules.

The compliance and enforcement sections specify in much greater detail than either the 2008 Rule or 2011 Rule how OCR will, in consultation and coordination with HHS funding components, enforce the Federal conscience and anti-discrimination laws. Implementation of the requirements set forth in this final rule

[37] OCR Complaint Nos. 14–193604, 15–193782, and 15–195665.

[38] Letter from OCR Director to Complainants (June 21, 2016) *available at http://www.adfmedia.org/files/CDMHCInvestigationClosureLetter.pdf.*

[39] In reaching this conclusion, the letter cited advice from ''HHS' Office of General Counsel, after consulting with the Department of Justice,'' but HHS has not located any written legal analysis from either the HHS Office of the General Counsel or the Department of Justice despite a diligent search.

[40] Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal., *at 9* (Jan. 18, 2019), *available at https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.*

will be conducted in the same way that OCR implements other civil rights requirements (such as the prohibition of discrimination on the basis of race, color, or national origin), which includes outreach, investigation, compliance, technical assistance, and enforcement practices. Enforcement will be based on complaints, referrals, and other information OCR may receive about potential violations, such as news reports and OCR-initiated compliance reviews and communications activities if facts suffice to support an investigation. If OCR becomes aware of a potential violation of Federal conscience and anti-discrimination laws, OCR will investigate, in coordination with the Department component providing Federal financial assistance or Federal funds to the investigated entity. If OCR concludes an entity is not in compliance, OCR, in consultation and coordination with the Department funding component(s), will assist covered entities with corrective action or compliance, or require violators to come into compliance. If, despite the Department's assistance, corrective action is not satisfactory or compliance is not achieved, OCR, in coordination with the funding component, may consider all legal options available to the Department, to overcome the effects of such discrimination or violations. Enforcement mechanisms where voluntary resolution cannot be reached include termination of relevant funding, either in whole or in part, funding claw backs to the extent permitted by law, voluntary resolution agreements, referral to the Department of Justice (in consultation and coordination with the Department's Office of the General Counsel), or other measures, as set forth in applicable regulations, procedures, and funding instruments. This final rule clarifies that recipients are responsible for their own compliance with Federal conscience and anti-discrimination laws and implementing regulations, as well as for ensuring their sub-recipients comply with these laws. This final rule also clarifies that parties subject to OCR investigation have a duty to cooperate and preserve documents and to report to their Department funding component(s) if they are subject to a determination by OCR of noncompliance. Finally, this final rule specifies that OCR may remedy claims of intimidation and retaliation against those who file a complaint or assist in an OCR investigation.

III. Analysis and Response to Public Comments on the Proposed Rule

HHS received over 242,000 comments in response to the notice of proposed rulemaking (NPRM).[41] HHS considered all comments filed in accordance with the Administrative Procedure Act and the instructions provided in the NPRM published in the **Federal Register** on January 26, 2018.

The Department's evaluation of the comments led to a number of changes between the NPRM and this final rule. The public comments and the changes made in issuing this final rule are discussed below.

A. General Comments

The Department received many comments on the proposed rule that expressed general support or opposition and did not include substantive or technical commentary upon the rule.

Comment: The Department received comments expressing concern about the impact of the rule on access to care in rural communities, underprivileged communities, or other communities that are primarily served by religious healthcare providers or facilities.

Response: Access to care is a critical concern of the Department. The Department does not believe this rule will harm access to care. When the Department promulgated the 2008 Rule protecting conscience rights in health care, it addressed comments about the rule's impact on access to care.[42] In that response, the Department stated that the regulation did not expand the scope of existing Federal conscience and anti-discrimination laws, and noted that implementation and enforcement of such laws would help alleviate the country's shortage of health care providers.[43] The Department also observed that it was contradictory to argue, as many commenters did, both that the rule would decrease access to care and that the then-current conscience protections for providers were sufficient: If the Department's new rule would decrease access to care because of an increase in providers' exercise of conscientious objections, it would seem that the statutory protections that existed before the regulation did not result in providers fully exercising their consciences as protected by law.[44]

The Department agrees with its previous response. The Federal conscience and anti-discrimination laws pre-exist these regulations. They provide rights and protections to health care providers, including in rural communities, underprivileged communities, or other communities that are primarily served by religious healthcare providers or facilities (together, ''underserved communities'').

There appears to be no empirical data, however, on how previous legislative or regulatory actions to protect conscience rights have affected access to care or health outcomes. Studies have specifically found that there is insufficient evidence to conclude that conscience protections have negative effects on access to care.[45] The Department is not aware of data in its possession, in the public comments, or in the public domain that provides a way to estimate how many health care providers either in general or in underserved communities are—and are not—exercising their conscience rights and protections, even though they are encompassed by Federal conscience and anti-discrimination laws, nor is the Department aware of data to determine how many providers, among those, would exercise their conscience rights and protections once this rule is finalized, and because it is finalized.

Because enforcement of the rule will remove barriers to entry into the health care professions, it is reasonable to assume that the rule may, in fact, induce more people and entities to enter or remain in the health care field. On a broad level, this effect is reasonably likely to increase, not decrease, access to care, including—and perhaps especially—in underserved communities. The Department is not aware of data, including from public commenters, that would provide a useful basis for a quantitative estimate of how many more providers would enter the health care field, or serve

[41] The comments are available at *https://www.regulations.gov/docket?D=HHS-OCR-2018-0002.* While *Regulations.gov* shows 72,417 public submissions were received, many comment submissions attached hundreds or thousands of individual comments, resulting in over 242,000 actual comments.

[42] 73 FR at 78080–81 (Dec. 19, 2008).

[43] 73 FR at 78081.

[44] *Id.*

[45] *See* Chavkin et al., ''Conscientious objection and refusal to provide reproductive healthcare: A White Paper examining prevalence, health consequences, and policy responses,'' 123 Int'l J. Gynecol. & Obstet. 3 (2013), S41–S56 (''[I]t is difficult to disentangle the impact of conscientious objection when it is one of many barriers to reproductive healthcare. . . . [C]onscientious objection to reproductive health care has yet to be rigorously studied.''); K. Morrell & W. Chavkin, ''Conscientious objection to abortion and reproductive healthcare: A review of recent literature and implications for adolescents,'' 27 Curr. Opin. Obstet. Gynecol. 5 (2015), 333–38 (''[T]he degree to which conscientious objection has compromised sexual and reproductive healthcare for adolescents is unknown.'').

underserved communities, as a result of this rule, nor what the corresponding increase of access to care might be. However, no public commenter provided any data that undermines the reasoning that leads the Department to believe that the rule will have such an effect. And several factors support the Department's position.

First, predictions that the rule will reduce services in underserved communities may be based on incorrect assumptions. As the Department has made clear, the rule does not expand the substantive protections of Federal conscience and anti-discrimination laws. Thus, to the extent commenters believe the rule would reduce services in underserved communities, that would seem to be based on an assumption that there are health care providers in underserved communities who are protected by these laws but are offering services to which they object anyway (for example, abortions or abortion referrals) because the laws are inadequately enforced. That is not necessarily a correct assumption. Such health care providers might be responding to a threat to their conscientious practice, not by offering the services despite their objections, but by leaving the health care field or a particular practice area involving that service. One poll suggests that over 80% of religious health care providers in underserved communities would likely limit their scope of practice if they were required to participate in practices and procedures to which they have moral, ethical, or religious objections, rather than provide the services.[46] If that is correct, improving enforcement of Federal conscience and anti-discrimination laws might reduce infringement of conscience protections, not by reducing the availability of services such as abortion, but by increasing the availability of other services by encouraging providers not to self-limit their practices in underserved communities.

Second, and relatedly, the rule might result in an increase in the number of providers overall, or in certain specialties within the health care field. Individuals and entities may have chosen not to enter the health care field because they anticipated they would be pressured to violate their consciences. In some cases, that decision may be the result of discrimination occurring during medical training, such as medical students' experiences of discrimination on the basis of their religious beliefs or moral convictions,[47] or by pressures faced by institutions because of their religious identity or moral convictions. Reducing that discrimination and pressure may lead to more individual and institutional health care providers overall, which could help increase, rather than decrease, services for underserved communities. Another way this effect may manifest itself is if the average facility has access to more highly qualified candidates because there is a larger pool of medical professionals from which to choose. Having more providers overall, so that the field as a whole provides a wide and diverse range of services, is preferable to having fewer providers, particularly with respect to underserved areas.

Third, the rule may prevent some health care providers from leaving the field. A certain proportion of decisions by currently practicing health providers to leave the profession may be motivated by such pressure.[48] With the rule's added emphasis on enforcing protections for rights of conscience, fewer individuals may leave the profession, and in turn they may help meet unmet needs for care. In addition, in some instances where a provider objects, based on conscience, to providing a service, there may be some underserved communities where other providers who have no such objections are available to provide the service. By contrast, without enforcement of Federal conscience and anti-discrimination laws, some providers with religious beliefs or moral convictions could close their doors (rather than violate their consciences), leaving a community even more underserved than if the provider were in practice.

The rule might allow an increase in the provision of health care by religious institutions as well, not just individuals. Religious hospitals or clinics, for example, if they are assured greater enforcement of their rights to practice medicine consistent with their religious beliefs, may find it worthwhile to expand to serve more people, including in underserved communities. Some commenters contend this could lead religious hospitals to move into underserved communities and crowd out other providers who might not have objections to certain services. The Department is not, however, aware of data demonstrating that the expansion of health care services by religious providers, particularly in underserved communities, would crowd out other providers who perform services that they do not, and market forces ordinarily would not dictate that result. Again, the Department is not aware of data demonstrating the dire results predicted by some commenters.

In addition, the relationship between religious or other conscientiously objecting providers and underserved communities may be far more complex than assumed by the prediction that this rule will decrease services. There are reasons to believe that many persons who might make use of protections under Federal conscience and anti-discrimination laws are already more likely to be located in certain underserved areas, and that their patients are similarly likely to share their views on issues such as abortion. According to the Pew Research Center, for example, ''urban dwellers are far more likely than their rural counterparts to say abortion should be legal in all or most cases.'' [49] This suggests that the enforcement of Federal conscience and anti-discrimination laws is not likely to be the cause of religious and other objecting providers being located in rural communities, but that such providers are already in those communities, and Congress passed these laws to protect them, among other individuals and entities, from being driven out of practice, which could exacerbate the lack of access to health care overall in those communities.

There is also reason to believe that religious institutions and individuals are disposed to serve in underserved communities because of elements of their religious mission besides objections protected by Federal conscience and anti-discrimination laws. For example, various commenters

[46] The CMA comment cited poll data from 2009 and 2011, which found that 82% of medical professionals ''said it was either 'very' or 'somewhat' likely that they personally would limit the scope of their practice of medicine if conscience rules were not in place. This was true of 81% of medical professionals who practice in rural areas and 86% who work full-time serving poor and medically-underserved populations . . . 91% agreed, 'I would rather stop practicing medicine altogether than be forced to violate my conscience.' ''

[47] The CMA comment cited a poll finding that twenty percent of responding faith-based medical students chose not to pursue a career in obstetrics/gynecology because of perceived coercion and discrimination in that field.

[48] The Christian Medical Association and Freedom2Care poll of May 3, 2011, found that 82% of medical professionals ''said it was either 'very' or 'somewhat' likely that they personally would limit the scope of their practice of medicine if conscience rules were not in place. This was true of 81% of medical professionals who practice in rural areas and 86% who work full-time serving poor and medically-underserved populations . . . 91% agreed, 'I would rather stop practicing medicine altogether than be forced to violate my conscience.' ''

[49] Pew Research Center, ''What Unites and Divides Urban, Suburban, and Ruran Communities'' (May 22, 2018), available at *https://www.pewsocialtrends.org/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/*.

contend the reason why Catholic hospitals are overrepresented in serving certain underserved populations is because the hospitals are motivated by their Catholic beliefs to serve unserved, underserved, underprivileged, or minority communities, and these commenters argue that Catholic hospitals (and, by extension, other religious providers) provide an overall benefit to underserved communities.[50] This overall benefit is consistent with Congress's apparent intent, in the Federal conscience and anti-discrimination laws, to ensure that the health care system remains open to the vibrant participation of religious and other providers, without barriers that can be created by discrimination against them, or infringements of their conscientious beliefs. Any loss of such providers because of the lack of enforcement of Federal conscience and anti-discrimination laws could decrease access to care for underserved communities. Therefore, when other commenters contend that women of color would be disproportionately harmed by this rule due to the significant services provided by Catholic hospitals, they do not seem to account for the fact that, without those hospitals' overall ability to exercise their religious mission, they would not be providing health care services to those communities in the first place.

The Department also disagrees with the assumption that the rule's enforcement of Federal conscience and anti-discrimination laws will result in harm, or in more harm than the benefits that derive from implementing Federal laws. As explained in the Regulatory Impact Analysis, *infra* at part IV.C.3.vii, the Department expects the rule to enhance, not impede, access to care in areas with fewer providers, such as rural communities. The Department is not aware of data establishing the views of commenters who say the rule will reduce services in underserved communities, or of data establishing quantitatively how much the rule will increase and enhance access to health care services in underserved communities. The Department concludes, instead, that it is reasonable to agree with commenters who believe the rule will not decrease access to care, and may increase it.

The Department finds that finalizing the rule is appropriate without regard to whether data exists on the competing contentions about its effect on access to services. Most significantly, finalizing the rule is appropriate because it enforces Federal conscience and anti-discrimination laws, which represent Congress's considered judgment that these rights are worth protecting even if they impact overall or individual access to a particular service, such as abortion. But finalizing the rule is also appropriate because the Department's belief that the rule will enhance access to care is based on reasonable, informed assumptions unrebutted by public comments submitted in opposition to the rule. Ultimately, the Department believes that this rule will result in more health care provider options and, thus, better health care for all Americans. The Department thus believes that it is appropriate to finalize this rule to enforce Federal conscience and anti-discrimination laws, even though the Department and commenters do not have data capable of quantifying all of its effects on the availability of care.

Comment: The Department received comments stating that protecting health care professionals' moral and religious convictions places health care providers above patients.

Response: The Department disagrees. First, this final rule provides for the enforcement of protections established by the people's representatives in Congress; the Department has no authority to override Congress's balancing of the protections. Second, protecting health care providers' rights of conscience ensures that health care providers with deeply held religious beliefs or moral convictions are not driven out of the health care industry—and, therefore, made unavailable to serve any patients and provide any health care services—because of their refusal to participate in certain objected-to activities, such as abortion, sterilization, or assisted suicide. Third, the Department believes the provider-patient relationship is best served by open communication of conscience issues surrounding the provision of health care services, including any conscientious objections providers or patients may have to providing, assisting, participating in, or receiving certain services or procedures. By protecting a diversity of beliefs among health care providers, these protections ensure that options are available to patients who desire, and would feel most comfortable with, a provider whose religious beliefs or moral convictions match their own. Even where a patient and provider do not share the same religious beliefs or moral convictions, it is not necessarily the case that patients would want providers to be forced to violate their religious beliefs or moral convictions.

Comment: The Department received comments expressing concern that the proposed rule would expand Federal conscience and anti-discrimination statutes to cover areas beyond the scope of the statutes. Several commenters raised concerns about expanding protection to HIV treatment, pre-exposure prophylaxis, and infertility treatment.

Response: The Department drafted the proposed rule to track the scope of each statute's covered activities as Congress drafted them, without being unduly broad or unduly narrow. For example, where the scope of laws that are the subject of this regulation is limited to certain enumerated procedures, the final rule makes clear that OCR will only pursue enforcement under those laws with respect to those enumerated procedures.

The Department is unaware of any cases claiming denial of service regarding these procedures brought under any of the statutes implemented by this rule. Public comments received by the Department did not cite such cases. In the event that the Department receives a complaint with respect to HIV treatment, pre-exposure prophylaxis, or infertility treatment, the Department would examine the facts and circumstances of the complaint to determine whether it falls within the scope of the statute in question and these regulations.

Discussion of this rule's potential application with regard to gender dysphoria is located in the section-by-section analysis regarding comments on the Church Amendments, *infra* at part III.B.

Comment: The Department received many comments expressing confusion or concern as to how the proposed rule would interact with or be in conflict with other Federal laws, such as the

[50] Ascension, REF: Docket HHS–OCR–2018–0002, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Mar. 27, 2018) (''As the largest non-profit health system in the U.S. and the world's largest Catholic health system, Ascension is committed to delivering compassionate, personalized care to all, with special attention to persons living in poverty and those most vulnerable. In FY2017, Ascension provided more than $1.8 billion in care of persons living in poverty and other community benefit programs.''); Catholic Health Association, REF: RIN 0945–ZA 03 Protecting Statutory Conscience Rights in Health Care; Delegations of Authority: Proposed Rule, 83 FR 3880, January 26, 2018 (Mar. 27, 2018) (''As a Catholic health ministry, our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of each and every human person, created in the image of God. Access to health care is essential to promote and protect the inherent and inalienable worth and dignity of every individual. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry and have driven CHA's long history of insisting on and working for the right of everyone to affordable, accessible health care.'').

Emergency Medical Treatment and Active Labor Act (EMTALA) and Federal anti-discrimination statutes (such as section 1557 of the ACA).

Response: This final rule provides the Department with the means to enforce Federal conscience and anti-discrimination laws in accordance with their terms and to the extent permitted under the laws of the United States and the Constitution. This final rule, like the 2008 Rule and the 2011 Rule, does not go into detail as to how its provisions may or may not interact with other statutes or in all scenarios, but OCR intends to read every law passed by Congress in harmony to the fullest extent possible so that there is maximum compliance with the terms of each law. With respect to EMTALA, the Department generally agrees with its explanation in the preamble to the 2008 Rule [51] that the requirement under EMTALA that certain hospitals treat and stabilize patients who present in an emergency does not conflict with Federal conscience and anti-discrimination laws. The Department intends to give all laws their fullest possible effect.

Comment: The Department received comments stating that the Department should withhold Federal financial assistance from any State that does not provide for religious exemptions to vaccination.

Response: This rule is only intended to provide enforcement mechanisms for the Federal conscience and anti-discrimination laws that Congress has enacted. The creation of a new substantive conscience protection is outside of the scope of this rulemaking. With respect to vaccination in particular, this rule provides for enforcement of 42 U.S.C. 1396s(c)(2)(B)(ii), which requires providers of pediatric vaccines funded by Federal medical assistance programs to comply with any State laws relating to any religious or other exemptions. Under the statute's plain text, this protection applies only to the extent a State already provides (or, in the future, chooses to provide) such an accommodation, and does not require a State to adopt such an accommodation.

Comment: The Department received comments stating that the proposed rule's enforcement mechanisms will not meaningfully further conscience protection because existing laws protecting religious beliefs or moral convictions are sufficient.

Response: The Department disagrees, and believes that the rule would make a meaningful difference in terms of compliance, as compared to the status quo. This rule provides appropriate enforcement mechanisms in response to a significant increase in complaints alleging violations of Federal conscience and anti-discrimination laws. Each law that is the subject of this rule meaningfully differs from the next. Moreover, the Department believes some laws have never been enforced, not necessarily because of widespread compliance with other overlapping laws, but because the Department has devoted no meaningful attention to those laws, has not conducted outreach to the public on them, and has not adopted regulations with enforcement procedures for them.

Comment: The Department received a comment requesting that the Department clarify that health care providers may establish systems to help meet patients' health care needs when a provider holds a religious belief or moral conviction that may affect the service or procedure that a patient is seeking.

Response: Nothing in the rule prohibits an entity from providing a lawful service it wants to provide, even as it respects the rights of personnel who may be protected by Federal laws from being required to provide, or assist in, the service. As discussed later in this preamble, the rule provides incentives for (but does not mandate) notices that parallel notice provisions under other anti-discrimination regulations. The Department believes that the provider-patient relationship is best served by open communication of conscience issues surrounding the provision of health care services, so that the consciences of patients, providers, and employees are respected whenever possible or required. Nothing in the rule precludes such communication or systems that encourage such communication. For example, providers may include notices in patient intake materials notifying patients that a provider's service provision is governed by certain ethical or religious principles. Providers may also encourage communication of moral or religious views by patients with respect to treatment in order to respect patients' wishes to the extent it is mutually acceptable or required. The Department declines to mandate any particular timeline or form in which a provider or patient must raise these sensitive issues. The Department encourages providers, if they are working with, or employing, health care professionals who may have religious or moral objections, especially with regard to certain procedures or treatments, to openly discuss these issues and have processes in place to identify and respect a diversity of views, further the provision of health care, and comply with the law. The final rule's modifications to the definition of ''discrimination'' permit employers of such personnel to accommodate the professionals' religious or moral objections, without interfering in the employer's delivery of health services.

Comment: The Department received comments questioning whether the Department has authority to issue regulations implementing some or all of the Federal conscience and anti-discrimination laws encompassed by this rule.

Response: The Federal conscience and anti-discrimination laws encompassed by this part, including the Church Amendments, section 245 of the Public Health Service Act, and the Weldon Amendment, require, among other things, that the Department and recipients of Department funds refrain from discriminating against institutional and individual health care entities that do not participate in certain medical procedures or services, including certain health services or research activities funded in whole or in part by the Federal government.

Compliance by the Department. Inherent in Congress's adoption of the statutes that require compliance by the Department, by departmental programs, and by recipients of Federal funds from the Department is the authority of the Department to take measures to ensure its own compliance. As explained more fully below, compliance reviews, complaint investigation, and record-keeping are standard measures for ensuring compliance with conditions Congress has imposed upon the Department and on recipients of Federal funds, including statutory nondiscrimination requirements. Moreover, 5 U.S.C. 301 empowers the head of an Executive department to prescribe regulations ''for the government of his department, the conduct of his employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.''

Compliance through funding instruments and agreements. In large part, the rule's enforcement mechanisms concerning entities that receive funds from the Department involve placing terms and conditions that implement Federal law in contracts, grants, and other Federal funding instruments and agreements. HHS has the authority to impose terms and conditions in its grants, contracts, and other funding instruments, to ensure recipients comply with applicable law, including

[51] 73 FR at 78087–88.

the aforementioned Federal conscience and anti-discrimination laws. The Department, furthermore, will enforce such terms and conditions requiring compliance with such conscience and anti-discrimination law in accordance with existing statutes, regulations and policies that govern such instruments, such as the Federal Acquisition Regulation; the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (HHS UAR), 45 CFR part 75; regulations applicable to CMS programs; the associated regulations relating to suspension and debarment; as well as any other regulations or procedures that govern the Department's ability to impose and enforce terms and conditions on funding recipients to comply with Federal requirements.

Grants and cooperative agreements. With respect to grants and cooperative agreements, the HHS UAR, 45 CFR part 75, requires adherence by award recipients to all applicable Federal statutes and regulations. For example, section 75.300(a) requires that the Department administer Federal awards to ensure that Federal funding and associated programs ''are implemented in full accordance with U.S. statutory and public policy requirements: Including, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination.'' The regulation also requires the Department to communicate to non-Federal entities all policy requirements and include them in the conditions of the award. 45 CFR 75.300(a).

Furthermore, section 75.371 sets forth remedies for non-compliance where the award recipient ''fails to comply with Federal statutes, regulations, or the terms and conditions of the Federal award.'' These remedies include disallowance, withholding, suspension, and termination of funding. 45 CFR 75.371. The HHS UAR also contains provisions relating to recordkeeping (45 CFR 75.503) and program specific audits (45 CFR 75.507), which the Department may invoke when enforcing grant terms and conditions that operate to implement the Federal conscience and anti-discrimination laws. In addition, Federal grant recipients must also sign OMB-approved assurances which certify compliance with all Federal statutes relating to non-discrimination and all applicable requirements of all other Federal laws governing the program.

In sum, the Department's enforcement of the Federal conscience and anti-discrimination laws for grantees will be conducted through the normal grant compliance mechanisms applicable to grants or other funding instruments, with OCR coordinating its investigation and compliance activities with the funding component. If the Department becomes aware that a State or local government or a health care entity may have undertaken activities that may violate any statutory conscience protection, the Department will work to assist such government or entity to comply with, or come into compliance with, such requirements or prohibitions. If, despite the Department's assistance, compliance is not achieved, the Department will consider all legal options as may be provided under 45 CFR parts 75 (HHS UAR) and 96 (regulations addressing HHS block grant programs), as applicable.

Contracts. With respect to Federal contracts and contractors, the Federal Property and Administrative Services Act of 1949 (''FPASA'') authorizes the promulgation of the Federal Acquisition Regulation (''FAR''). 40 U.S.C. 121(c). The FAR, in turn, authorizes agency heads to ''issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.'' 48 CFR 1.301–(a)(1). In addition, Federal agencies are required to prepare their solicitations and resulting contracts utilizing a uniform contract format, which permits agencies to include a clear statement of any ''special contract requirements'' that are not included in its standard government contract clauses or in other sections of the uniform contract format. 48 CFR 15.204–2–(h). Finally, pursuant to the FAR and other legal authorities, the Department has established the Department of Health and Human Services Acquisition Regulation (''HHSAR'') [48 CFR parts 300 through 370], which establishes uniform departmental acquisition policies and procedures that implement and supplement the FAR. The HHSAR contains departmental policies that govern the acquisition process or otherwise control acquisition relationships between the Department's contracting activities and contractors. The HHSAR contains (1) requirements of law; (2) HHS-wide policies; (3) deviations from FAR requirements; and (4) policies that have a significant effect beyond the internal procedures of the Department or a significant cost or administrative impact on contractors or offerors. *See* 48 CFR 301.101(b); *see also* 48 CFR 301.103(b) (''The Assistant Secretary for Financial Resources (ASFR) prescribes the HHSAR under the authority of 5 U.S.C. 301 and section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 121(c)(2)), as delegated by the Secretary[ ].''). As a result, the Department has ample authority to include terms and conditions in its contracts consistent with the Federal conscience and anti-discrimination laws. Furthermore, the Federal Acquisition Regulation provides a variety of mechanisms that may be used to enforce such contract provisions (*e.g.,* 48 CFR part 49 ''Termination of Contracts''). Thus, the Department intends to implement and enforce contract terms on the Federal conscience and anti-discrimination laws through the FAR and HHSAR and other Federal laws and regulations that govern the administration and performance of Federal contracts.

Other rulemaking authorities. Under the ACA section 1321(a), 42 U.S.C. 18041, the Department has the authority to promulgate regulations implementing the ACA conscience provisions. Section 1321(a) provides authority to the Secretary to issue regulations setting standards for meeting the requirements under Title I of the ACA, and the amendments made by Title I, with respect to the establishment and operation of Exchanges (including SHOP Exchanges), the offering of qualified health plans through such Exchanges, the establishment of the reinsurance and risk adjustment programs under part V, and such other requirements as the Secretary determines appropriate. This provision authorizes the Secretary to promulgate regulations setting standards for regulated entities to meet the conscience protection requirements in ACA sections 1303(b)(1)(A) & (b)(4), 1411, and 1553, 42 U.S.C. 18023(b)(1)(A) & (b)(4), 18081, 18113, all of which are located in Title I of the ACA.

With respect to the Medicare, Medicaid, and Children's Health Insurance Program (CHIP), section 1102 of the Social Security Act, 42 U.S.C. 1302, authorizes the Secretary to ''make and publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [he] is charged under this Act.'' This provides the Secretary with authority to promulgate regulations that provide for compliance by participants in the Medicare, Medicaid, and CHIP programs, including Medicare

providers, State Medicaid and CHIP programs, etc., with applicable Federal conscience and anti-discrimination laws.

Furthermore, with respect to funding instruments administered by the Centers for Medicare & Medicaid Services (CMS), including instruments or agreements authorized by the Social Security Act and ACA, the Secretary has the authority under section 1115(a)(2) of the Social Security Act to authorize Federal matching funds in expenditures by State Medicaid agencies that would not otherwise be eligible for Federal matching in order to carry out a demonstration project that promotes the objectives of the Medicaid or CHIP programs. Under section 1115A of the Social Security Act, Federal funds are available to test innovative payment and service delivery models expected to reduce costs to Medicare, Medicaid, or CHIP, while preserving or enhancing the quality of care furnished to the beneficiaries of these programs. The Secretary has the authority to include terms and conditions addressing Federal conscience and anti-discrimination laws in certain funding instruments or agreements under these authorities. The Secretary also has the authority to impose terms and conditions in certain grant instruments under some of its grant authorities, such as the grants available to States for ACA implementation under section 2794(c)(2)(B) of the Public Health Service Act. In addition, the Secretary has the authority to include such requirements, through rulemaking, with respect to State Medicaid programs generally, Medicaid managed care organizations (section 1902(a)(4) of the Social Security Act), Medicare Advantage organizations (section 1856(b)(1) of the Social Security Act) and Medicare Part D sponsors (section 1857(e)(1) of the Social Security Act), other types of Medicare providers and suppliers of items and services,[52] and Qualified Health Plans offering individual market coverage on State exchanges.

To the extent that terms and conditions relating to Federal conscience and anti-discrimination laws are incorporated into CMS's instruments or agreements, CMS would have the authority to enforce such terms pursuant to the relevant enforcement mechanism for each instrument or agreement. For example, with respect to a special term and condition under a section 1115 demonstration, the demonstration could be terminated for a failure to comply with a term and condition. With respect to section 1115A, it would depend on the legal instrument used. For cooperative agreements, the enforcement mechanism would be Federal grants law. For addenda to existing contracts, the enforcement mechanism would be Federal procurement law. For participation agreements and regulations—through which CMMI operates most of its section 1115A models—CMS could enforce these requirements under the terms of the agreement or regulation itself (which allow CMS to take certain corrective actions, up to and including termination of a non-compliant participant from the model) and, under certain circumstances, under general CMS regulations (*e.g.,* regarding recoupments). In the case of a CMS grant program, it would depend on the terms included in the grant award, but grant funds could be subject to forfeiture in some instances. Medicaid requirements imposed through rulemaking would be enforced through a compliance action under section 1902(a)(4) of the Social Security Act. For Medicare Advantage or Part C contracts, there are intermediate sanctions, civil money penalties, and potential contract termination for violations of contract requirements. In the case of Medicare providers and suppliers, enforcement could involve loss of a provider agreement or certification.

Debarment and suspension. Finally, the Department notes that it has the authority, where appropriate, to initiate debarment or suspension proceedings against entities that are otherwise eligible to receive Federal funding pursuant to grants and cooperative agreements, contracts and other funding instruments. *See, e.g.,* 48 CFR part 9.4; 2 CFR part 376. Entities that are debarred, suspended, or proposed for debarment are also excluded from conducting business with the Government and, thus, are generally not eligible to receive Federal funds during the duration of the suspension or debarment. The Department notes that, under the FAR, an entity may be debarred for the ''[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.'' 48 CFR 9.406–2(a)(5). In addition, a contractor may be debarred for a ''[w]illful failure to perform in accordance with the terms of one or more contracts.'' 48 CFR 9.406–2(b). Thus, the Department will consider whether suspension or debarment may be appropriate when enforcing terms and conditions implementing the Federal conscience and anti-discrimination laws.

Receipt and processing of complaints. With regard to the receipt and processing of complaints of violations of the Federal conscience and anti-discrimination laws, it is well settled in case law that every agency has the inherent authority to issue interpretive rules and rules of agency practice and procedure. 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4 (4th ed. 2002). This rule does not substantively alter or amend the obligations of the respective statutes, *JEM Broad.* v. *FCC,* 22 F.3d 320 (D.C. Cir. 1994), and the definitions offered in this rule are reasonably drawn from the existing statutes. *Hoctor* v. *Dept. of Agriculture,* 82 F.3d 165 (7th Cir. 1996). As a result, the Department and OCR have authority to issue interpretations regarding the Federal conscience and anti-discrimination laws, many of

[52] Through delegation from the Secretary, CMS has statutory authority to place conditions on participation in its programs under the following authorities:

1. Skilled nursing facilities (SNFs)—section 1819(d)(4)(B) of the Act [42 U.S.C. 1395i–3(d)(4)(B)].

2. Medicaid nursing facilities (NFs)—section 1919(d)(4)(B) of the Act [42 U.S.C. 1396r(d)(4)(B)].

3. Hospitals—section 1861(e)(9) of the Act [42 U.S.C. 1395x(e)(9)].

4. Psychiatric hospitals—section 1861(f)(2) of the Act [42 U.S.C. 1395x(f)(2)], cross referencing 1861(e)(9).

5. Long term care hospitals—section 1861(ccc)(3) of the Act [42 U.S.C. 1395x(ccc)(3)], cross referencing section 1861(e).

6. Home health agencies (HHAs)—section 1861(o)(6) of the Act [42 U.S.C. 1395x(o)(6)].

7. Rehabilitation agencies and Clinics as providers of physical, occupational therapy and speech language pathology services—section 1861(p)(4)(A)(v) of the Act and 1861(p)(4) *flush language* [42 U.S.C. 1395x(p)(4)].

8. Comprehensive outpatient rehabilitation facilities (CORFs)—section 1861(cc)(2)(J) of the Act [42 U.S.C. 1395x(cc)(2)(J)].

9. Hospice—section 1861(dd)(2)(G) of the Act [42 U.S.C. 1395x(dd)(2)(G)].

10. Community mental health centers (CMHCs)—section 1861(ff)(3)(B)(iv) of the Act [42 U.S.C. 1395x(ff)(3)(B)(iv)].

11. Religious nonmedical health care institution (RNHCIs)—section 1861(ss)(1)(J) of the Act [42 U.S.C. 1395x(ss)(1)(J)].

12. Portable x-ray suppliers—1861(s)(3) of the Act [42 U.S.C. 1395x(s)(3)]

13. Independent clinical laboratories—section 353(f)(1)(E) of the Public Health Act [42 U.S.C. 263a(f)(1)(E)] (authorizing the Secretary to make additional regulations ''necessary to assure consistent performance by such laboratories of accurate and reliable laboratory examinations and procedures'').

14. Rural health clinics (RHCs)—section 1861(aa)(2)(K) of the Act [42 U.S.C. 1395x(aa)(2)(K)].

15. Intermediate care facilities for individuals with intellectual disabilities (ICF/IIDs)—section 1861(e)(9) of the Act [42 U.S.C. 1395x(e)(9)].

which have been placed in the Department's program statutes.

Comment: The Department received a comment requesting that long-term care and post-acute providers be exempted from the rule because such entities are already heavily regulated.

Response: The Department declines to provide this exemption. The rule provides for appropriate enforcement of statutes protecting foundational civil rights, and Congress did not exempt long-term care or post-acute providers from these civil rights laws.

B. Section-by-Section Analysis [53]

Purpose (§ 88.1)

In the NPRM, the Department's ''Purpose'' section set forth the objective that the proposed regulation would, when finalized, provide for the implementation and enforcement of Federal conscience and anti-discrimination laws. It also stated that the statutory provisions and regulations contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes. The Department did not receive comments on this section beyond the general comments addressed above. Section 88.1 of the final rule reflects technical edits to replace the word ''persons'' with ''individuals,'' for clarity, and to refer to the set of statutes encompassed by this rule collectively as the ''Federal conscience and anti-discrimination laws, which are listed in § 88.3 of this part.'' Throughout the final rule, the Department has made changes to refer to those statutes as ''Federal conscience and anti-discrimination laws,'' rather than ''Federal conscience protection and associated anti-discrimination laws.''

Summary of Regulatory Changes: The Department believes, as discussed above, that there are various reasons why this rule is needed and appropriate to provide for the implementation and enforcement of Federal conscience and anti-discrimination laws. In addition, the Department believes it is appropriate to interpret the rules broadly, within the scope of the text set forth in each statute, to effectuate their protective purposes. Generally, it is appropriate to broadly interpret laws enacted to protect civil rights and prevent discrimination. For the reasons described in the proposed rule [54] and above, and considering the comments received, the Department finalizes this section as proposed, but with technical edits to replace the word ''persons'' with ''individuals,'' add the term ''certain'' in regard to health care services, remove the term ''for example'' and ''comprehensively'' in relation to the degree of the protections, for clarity, and to refer to the statutes part 88 addresses as ''Federal conscience and anti-discrimination laws, which are listed in § 88.3 of this part.''

Definitions (§ 88.2)

In the NPRM, the Department proposed definitions of various terms. The comments and the responses applicable to each definition are set forth below.

Administered by the Secretary. The Department proposed that a federally funded program or activity is ''administered by the Secretary'' when it is ''subject to the responsibility of the Secretary of the U.S. Department of Health and Human Services, as established via statute or regulation.'' The Department did not receive comments specifically on this definition.

In proposing the definition for ''administered by the Secretary,'' the Department noted that the 2008 Rule had not defined the phrase, and that the proposed definition was intended to add clarity. Upon further review and in consideration of general comments received concerning whether the proposed rules are sufficiently clear, the Department has concluded that the proposed definition does not add substantial clarity to the plain meaning of the phrase ''administered by the Secretary.'' No commenters submitted comments on this question, which suggests that there is no confusion about the meaning of this phrase. The Department is finalizing this rule without adopting the proposed definition, or any definition, of ''administered by the Secretary.'' In the event that the Department is asked to consider the meaning of this phrase in its application of the rule, the Department will apply the standard canons of statutory construction.

Summary of Regulatory Changes: For the reasons described above, the Department finalizes the rule without a definition of the phrase ''administered by the Secretary.''

Assist in the Performance. The Department proposed that ''assist in the performance'' means ''to participate in any program or activity with an articulable connection to a procedure, health service, health program, or research activity, so long as the individual involved is a part of the workforce of a Department-funded entity.'' The definition specified that ''[t]his includes but is not limited to counseling, referral, training, and other arrangements for the procedure, health service, health program, or research activity.'' The Department received comments on this definition, including comments generally supportive of the proposed definition and generally opposed to it. Because comments evidenced significant confusion over the proposed definition, the Department amends the definition, as described further below.

Comment: The Department received comments suggesting that the definition of ''assist in the performance'' is unnecessary because employees maintain the option to seek employment elsewhere.

Response: The Department disagrees. Congress established requirements, including the protections interpreted by this final rule, for recipients of certain Federal financial assistance or participants in certain Federal programs. Those obligations are not obviated merely because an employee who desires to make use of the protections that Congress provided could, instead, find employment elsewhere. Indeed, forcing a person to find employment elsewhere (which includes as a result of being fired), because they make certain protected objections to procedures, or because of their religious beliefs or moral convictions, is a quintessential example of the discrimination and coercion that these laws prohibit. The existence of numerous comments employing this line of reasoning provides additional evidence of the need for this final rule, so that the Department may better educate both recipients and the public on the law, and may ensure vigorous enforcement where education proves insufficient to achieve compliance.

Comment: The Department received comments stating that the proposed ''articulable connection'' standard is too broad and would permit objections by persons whom certain commenters contend have only a tangential connection to the objected-to procedure or health service program or research activity. Some commenters included examples such as a person preparing a room for an abortion or scheduling an abortion.

Response: The Department believes that the proffered examples are properly considered as within the scope of the protections enacted by Congress for those who choose to assist and those who choose not to assist in the performance of an abortion. Scheduling an abortion or preparing a room and the instruments for an abortion are necessary parts of the process of providing an abortion, and it is

[53] Unless indicated otherwise, the Department adopts the regulation text as proposed.

[54] 83 FR 3880, 3892.

reasonable to consider performing these actions as constituting ''assistance.''

The definition will ensure a sufficient connection between the conduct for which (or from which) the conscientious objector is seeking relief and the protections Congress established in law. This approach would ensure that health care workers are not driven from the health care industry because of conflicts with their religious beliefs or moral convictions in connection with practices as set forth by Congress, such as abortion. It would also dissuade employers from attempting to skirt protections through improperly narrow interpretations of the term.

Nevertheless, in response to concerns about the potential overbreadth and need for increased clarity of the definition, the Department finalizes the definition with a change to the first sentence, so that it reads: To assist in the performance means ''to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity.'' The Department believes that replacing the phrase ''to participate in any activity'' with the phrase ''to take an action'' more clearly and precisely explains the conduct covered by ''assist in the performance.'' The phrase ''undertaken by or with another person or entity'' distinguishes ''assisting'' from ''performing,'' as assisting implies working with another. This change would also ensure that any articulable connection must also be ''reasonable'' and ''specific.'' It would, therefore, preclude vague or attenuated allegations that do not support a claim of assisting in a procedure or health service program or research activity. For example, a health care worker who objects to being scheduled to conduct physicals on some patients, when abortions are scheduled on the same day for unrelated patients elsewhere in the building, would not have a claim of being coerced into ''assisting'' with an abortion, barring additional facts. Conversely, where a provider requires the designation and availability of a backup doctor whenever an abortion is to be performed, that designation may constitute assistance in the performance of an abortion even if no complications arise requiring the backup doctor to intervene during or after an abortion in a particular instance. In addition, the Department clarifies that the activities need only to regard ''part of a health service program or research activity,'' in contrast to, for example, furthering the health service program as a whole.

The Department believes these changes adequately respond to commenters who contend the proposed definition of ''assist in the performance'' is insufficiently clear, without narrowing the definition to exclude actions that do constitute assistance in the performance. The Department believes the definition in the final rule, while still requiring OCR to weigh the facts and circumstances of each case, provides additional clarity. Congress did not define ''assist in the performance.'' The Department considered not finalizing a definition of ''assist in the performance,'' but without any definition, there may be confusion about what the term includes, with different employers interpreting it more broadly or more narrowly. For example, in the *Danquah* lawsuit, where nurses contended they were required to assist abortion cases in violation of the Church Amendments, a public hospital receiving Public Health Service Act funds filed a brief in Federal court stating that ''to administer routine pre and post-operative care'' to abortion patients does not constitute assisting in the performance of an abortion under the Church Amendments.[55] Without taking a position on the facts of that case, the Department disagrees with a narrow interpretation of assisting in the performance that excludes pre- and post-operative support to a scheduled abortion procedure. The Department believes that the confusion among covered entities and members of the public about what constitutes assistance in the performance of a health service makes it appropriate for the Department to define ''assist in the performance'' with the changes as set forth in this final rule.

Comment: The Department received a comment requesting that ''articulable connection'' be replaced with ''reasonable connection'' because ''articulable connection'' may be abused by persons articulating connections that are irrational.

Response: The Department agrees in part, to the extent that the reasonableness standard should be included in the definition. As stated above, in response to similar concerns about potential overbreadth, the Department has modified the sentence containing the phrase, ''to participate in any program or activity with an articulable connection to a procedure,'' to add the word ''reasonable,'' and other language to limit its scope and add greater specificity. Specifically, the final rule describes ''to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or health service program or research activity undertaken by or with another person or entity.'' This standard would preclude irrational assertions that an action constitutes assisting in the performance of a procedure, because it requires the action to have a specific, reasonable, and articulable connection to furthering the procedure. If the connection between an action and a procedure is irrational, there is no actual connection by which the action specifically furthers the procedure. The Department does not interpret the language to permit irrational applications.

Comment: The Department received a comment suggesting that the ''articulable connection'' standard be replaced with a standard that connects that assistance to the clinical setting and includes a complete, not illustrative, list of activities subject to the protections.

Response: The Department believes this concern is adequately addressed by the changes described above to clarify the definition of ''assist in the performance.'' The Department disagrees with the recommended approach because the statutory protections for objecting to assisting in the performance of procedures encompasses situations beyond the narrow scope proposed by the commenter. For example, an unlawfully coerced assistance in an abortion is no less unlawful if the coercion takes place outside a particular clinical setting, as opposed to within such clinical setting. Furthermore, creating an exhaustive list of potentially protected conduct does not allow for variations from State to State, or even clinic to clinic, in how procedures are handled. Such an approach also does not consider the diverse ways in which protected moral or religious objections may manifest, and would not account for changes in practices over time.

Comment: The Department received comments stating that the scope of persons protected by the definition of ''assist in the performance'' is too broad because it extends beyond health care professionals and includes other members of the workforce.

Response: The Department acknowledges that inclusion of a reference to workforce members in the definition of ''assist in the performance'' has caused confusion among commenters. The Department has concluded this reference is not necessary because the scope of persons and entities protected from being forced to ''assist in the performance'' of an

[55] Defs.' Brief in Opp. To Pls.' App. For Prelim. Inj. at 26, *Danquah,* No. 2:11–cv–06377–JLL–MAH, doc. # 26 (D.N.J. filed Nov. 22, 2011).

objected to procedure is already governed by provisions in the relevant law and this rule. Accordingly, the Department is finalizing the definition of ''assist in the performance'' to delete the reference to workforce members. Similarly, the Department is removing the reference to ''any program or activity'' as part of the definition of ''assist in the performance'' because the new language in the definition—''to take an action that has a specific articulable connection''—makes the reference to ''any program or activity'' unnecessary. The Department is also removing the reference to ''health program or activity'' because that term is no longer defined in the final rule, as discussed further below.

Comment: The Department received comments expressing concern that the definition of ''assist in the performance'' would cover ambulance drivers.

Response: EMTs and paramedics are treated like other health care professionals under this definition. Federal conscience and anti-discrimination laws would apply to them, or not, based on whether the elements of the law (and this final rule) are satisfied in a particular circumstance. To the extent the commenters contend that the kinds of actions that ambulance crews perform never count as assisting in the performance of a procedure encompassed by a Federal conscience or anti-discrimination law, the Department declines to take such a categorical approach. As discussed earlier, where EMTALA might apply in a particular case, the Department would apply both EMTALA and the relevant law under this rule harmoniously to the extent possible. EMTs and paramedics are trained medical professionals, not mere ''drivers.'' If commenters contend that driving a patient to a procedure should never be construed to be assisting in the performance of a procedure, the Department disagrees and believes it would depend on the facts and circumstances of each case. For example, the Department believes driving a person to a hospital or clinic for a scheduled abortion could constitute ''assisting in the performance of'' an abortion, as would physically delivering drugs for inducing abortion.

To the extent commenters are referring to emergency transportation of persons experiencing unforeseen complications after, for example, an abortion procedure, the Department does not believe such a scenario would implicate the definition of ''assist in the performance of'' an abortion, because the complications in need of treatment would be an unforeseen and unintended byproduct of a completed procedure. Further, the Department is not aware of any entities or medical professionals that would object to treating someone, or transporting someone to treatment, under these circumstances.

To the extent commenters are referring to emergency transportation of persons with conditions such as an ectopic pregnancy, where the potential procedures performed at the hospital may include abortion, the question of whether such transportation falls under the definition of ''assist in the performance'' would depend on the facts and circumstances. However, as a general matter, the Department does not believe that mere speculation that an objected-to service or procedure may occur suffices to establish a specific and reasonable connection between the objected-to service or procedure and the act of transporting the patient.

The Department's existing regulation implementing EMTALA at 42 CFR 489.24 defines EMTALA's statutory language ''comes to the emergency department'' [56] to include an individual who is en route to a hospital in an ambulance owned and operated by the hospital, with limited exceptions, as well as, in certain circumstances, an individual who is en route to a hospital in an ambulance that is not owned and operated by the hospital.[57] Federal Appeals Courts in the Ninth and First Circuits have examined the Department's regulatory definition of ''comes to the emergency department,'' and have upheld the Department's regulatory definition for EMTALA as reasonable, and have distinguished other Federal Circuits' cases interpreting EMTALA by differentiating the cases by their facts or by the nature of the courts' analyses.[58]

Comment: The Department received comments stating that the inclusion of counseling and referral in the definition of ''assist in the performance'' was not the intent of Congress in enacting the Church Amendments. Some commenters pointed to differing language in the Church, Weldon, and Coats-Snowe Amendments to support this assertion.

Response: Congress did not define the phrases ''assist in the performance,'' ''counsel,'' or ''recommend'' in the Church Amendments; ''refer'' or ''referral'' in Weldon or Coats-Snowe; or ''make arrangements for'' in Coats-Snowe. Some commenters contend that the meaning of these terms are completely distinct and should never be interpreted as overlapping. The Department disagrees. When Congress enacted paragraphs (b) and (c)(1) of the Church Amendments in 1973, and paragraphs (c)(2) and (d) in 1974, it used the phrase ''assist in the performance'' regarding certain medical procedures. Congress then enacted paragraph (e) in 1979 to protect applicants for medical training or study from discrimination based on their reluctance or willingness ''to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations.''

Counseling and referral are common and well understood forms of assistance that materially help people reach desired medical ends. Indeed, because referrals are so tightly bound to the ultimate performance of medical procedures, Congress banned many forms of referral fees or ''kickbacks'' among providers receiving Medicare and Medicaid reimbursements. *See* the Medicare and Medicaid Patient Protection Act of 1987, as amended, 42 U.S.C. 1320a–7b (the ''Anti-Kickback Statute'') and the Ethics in Patient Referrals Act of 1989, as amended, 42 U.S.C. 1395nn (the ''Stark Law''). Similarly, counseling of some form regarding abortion is often *required* before the procedure can be performed, as is the case in 33 States,[59] and many hospitals and health care facilities likely require some kind of counseling as a prerequisite to abortion of their own accord.

Based on the text, structure, and purpose of the statutes at issue, the Department interprets ''assist in the performance'' broadly and does not believe the presence of more specific terms of assistance elsewhere in the Church Amendments, or in other laws that are the subject of this rule, narrows the meaning of the phrase. It would be contrary to the structure and history of the Church Amendments to interpret provisions protecting conscience in the *study* of abortion procedures significantly more broadly than provisions protecting conscience in the actual *performance* of an abortion procedure.

The Department, however, does not believe that every form of counseling, training, or referral (as defined under

[56] 42 U.S.C. 1395dd(a).

[57] 42 CFR 489.24(b)(3) and (4).

[58] *Morales* v. *Sociedad Espanola de Auxilio Mutuo y Beneficencia,* 524 F.3d 54, 60–61 (1st Cir. 2008) (holding that the HHS regulatory definition comports with EMTALA's purpose and remedial framework and distinguishing cases from the Fifth and Seventh Circuits); *Arrington* v. *Wong,* 237 F.3d 1066, 1073–74 (9th Cir. 2001) (same).

[59] Counseling and Waiting Periods for Abortion, Guttmacher Institute (Oct. 1, 2018), *https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.*

this rule) necessarily constitutes assistance in the performance of a procedure under this rule. The Department, therefore, finalizes the definition of ''assist in the performance'' by changing the second sentence to read ''This may include counseling, referral, training, or otherwise making arrangements for the procedure or health service program or research activity, depending on whether aid is provided by such actions.''

Comment: The Department received comments expressing concern that the definition of ''assist in the performance'' combined with the language of 42 U.S.C. 300a–7(d) could impact counseling or referrals for LGBT persons.

Response: Several provisions of statutes that are the subject of this rule are specific to abortion, sterilization, assisted suicide, or other procedures, and provide specific protections. In 42 U.S.C. 300a–7(d) (and 300a–7(c)(2)), Congress directed the protection of conscientious objections in contexts not tied to specific treatments. When the previous administration finalized 45 CFR part 88 in 2011, it affirmed its commitment to enforce Federal conscience and anti-discrimination laws, including 42 U.S.C. 300a–7(d). (76 FR at 9972). The Department continues and expands on that commitment in this rule. The Department does not pre-judge matters without the benefit of specific facts and circumstances, and particular claims under 42 U.S.C. 300a–7(d) will be evaluated on a case-by-case basis.

Nevertheless, the Department believes that some commenters may misunderstand the scope of paragraph (d). Generally, the protections of paragraph (d) follow the funds provided by any program administered by the Secretary. But paragraph (d) does not encompass every medical treatment or service performed by any entity receiving Federal funds from HHS for whatever purpose. Instead, Congress narrowly focused paragraph (d) to prohibit the coercion of persons ''in performance of'' health service programs funded under a program administered by the Secretary. As explained more fully in response to other comments below with respect to paragraph (d), many medical treatments and services performed by health care providers are not ''part of'' a health service program receiving funding from HHS. In such circumstances, paragraph (d) would not apply.

Comment: The Department received comments expressing concern that the definition of ''assist in the performance'' will result in conscientious objectors refusing to provide information to patients about objected-to treatment options, potentially in violation of principles of informed consent.

Response: The Department disagrees that the rule would violate principles of informed consent. Medical ethics have long protected rights of conscience alongside the principles of informed consent. The Department does not believe that enforcement of conscience protections, many of which have been in place for nearly fifty years, violates or undermines the principles of informed consent. This rule will not change the obligation that, absent exigent circumstances, doctors secure informed consent from patients before engaging in a medical procedure.

Summary of Regulatory Changes: For the reasons described in the proposed rule [60] and above, and considering the comments received, the Department adopts the definition of ''assist in the performance'' with changes to read that it means ''to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or health service program or research activity undertaken by or with another person or entity.'' The definition specifies that ''[t]his may include counseling, referral, training, or otherwise making arrangements for the procedure or health service program or research activity, depending on whether aid is provided by such actions.'' This new definition removes ''so long as the individual involved is a part of the workforce of a Department-funded entity'' for accuracy and clarity and makes other minor language changes, for example, changing ''includes but is not limited to'' to ''may include.''

Department. The Department proposed that ''Department means the Department of Health and Human Services and any component thereof.'' The Department did not receive comments on this definition.

Summary of Regulatory Changes: For the reasons described in the proposed rule [61] and above, the Department adopts the definition of ''Department'' as proposed.

Discriminate or *Discrimination.* The Department proposed ''*discriminate* or d*iscrimination*,'' to mean one of four categories of adverse actions or treatment, for which each paragraph or type of action within each paragraph would apply as permitted by the applicable statute. Paragraph (1) of the definition addressed prohibited adverse actions or treatment, as permitted by the applicable statute, as those actions relate to any grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, title, or other similar instrument, position, or status. Paragraph (2) addressed prohibited adverse actions or treatment, as permitted by the applicable statute, as those actions relate to any benefit or privilege. For both paragraphs, prohibited adverse actions or treatment included those to withhold, reduce, exclude, terminate, restrict, or otherwise make unavailable or deny the categories listed in paragraphs (1) and (2). Paragraph (3) addressed the use of any criterion, method of administration, or site selection, including the enactment, application, or enforcement of laws, regulations, policies, or procedures directly or through contractual or other arrangements, that tends to subject individuals or entities protected under the rule to any adverse effect described in this definition, or has the effect of defeating or substantially impairing accomplishment of a health program or activity with respect to individuals, entities, or conduct protected under the rule. Finally, paragraph (4) of the definition set forth a catch-all for which discriminate or discrimination means to otherwise engage in any activity reasonably regarded as discrimination, including intimidation or retaliatory action.

The Department received comments on this definition, including comments generally supporting or opposing the proposed definition.

Comment: The Department received comments stating that the definition of ''discriminate or discrimination'' would encompass situations in which States apply neutral laws of general applicability that require the performance of abortion, and such commenters disagreed that a neutral law of general applicability can be deemed an act of discrimination.

Response: The term ''neutral law of general applicability'' is a legal term of art that derives from case law interpreting the Free Exercise Clause of the First Amendment. What renders a law ''neutral'' in the Free Exercise context is that the law is not by its text, history, motive, or operation targeted at the protected activity of religious exercise. If commenters are contending that States that might otherwise be prohibited by a Federal conscience or anti-discrimination law from discriminating against doctors who refuse to perform abortions may nonetheless do so pursuant to a neutral State law of general applicability, the Department disagrees. States that accept

[60] 83 FR 3880, 3892 (stating the reasons for the proposed definition of ''assist in the performance,'' except for the modifications adopted herein).

[61] 83 FR 3880, 3892.

applicable Federal funds and thereby subject themselves to Federal conscience and anti-discrimination laws cannot evade the requirements of those laws through neutral laws of general applicability. For example, the Weldon Amendment flatly prevents State laws from discriminating against doctors because they do not perform abortions against their will regardless of whether the law is ''neutrally'' worded or applied. Subjecting persons to penalties or adverse treatment because they decline to perform abortions is a form of discrimination encompassed by the Weldon Amendment. Even if a State law were to impose penalties on OB/GYNs because they decline to perform any lawful procedure they are competent to perform (the Department is not aware of such a law), and that law were used to impose penalties on OB/GYNs because they do not perform abortions, that would also constitute discrimination encompassed by the Weldon Amendment. The Coats-Snowe Amendment similarly prohibits discrimination against a health care entity, such as an individual physician, who (among other things) declines to perform abortions. Additionally, under both the Coats-Snowe and Weldon Amendments, protected entities and individuals need not specify a motive, or provide a justification, for declining.

Paragraph (c)(1) of the Church Amendments provides that a covered entity cannot discriminate against any physician or other health care personnel (1) because he or she performed or assisted in the performance of a sterilization or abortion procedure, (2) because he or she refused to so perform or assist ''on the grounds that'' doing so ''would be contrary to his [or her] religious beliefs or moral convictions,'' or (3) ''because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.'' The last provision covers circumstances where a covered entity's motive is arguably driven by anti-religious animus. But the second prohibition of discrimination does not rely on animus on the part of the entity committing the discrimination; it rests solely on whether the person refused to perform or assisted in the performance of a sterilization or abortion procedure on the grounds of the person's religious beliefs or moral convictions with respect to such procedures. Therefore, under paragraph (c)(1), a covered entity cannot discriminate against a doctor, for example, because of his or her refusal to perform abortions on the grounds of religious beliefs or moral convictions regardless of whether the covered entity's discrimination is accompanied by anti-religious animus, or whether the entity would also penalize doctors who refuse to perform abortions for non-protected reasons. Nothing in the legislative history of the Church Amendments suggests that Congress intended to permit entities receiving applicable funds to coerce religiously or morally motivated doctors to perform abortions, so long as those entities also require doctors who do not have qualms about abortions to perform them.

Consequently, the Department concludes that the concept of discrimination, as used in Federal conscience and anti-discrimination laws, can encompass a situation where a State takes adverse action against a doctor because of the doctor's refusal to perform an abortion, even under a general or ''neutral'' law mandating the performance of abortions.

Comment: The Department received comments stating that the phrase ''any activity reasonably regarded as discrimination'' is overbroad or impermissibly vague.

Response: Discrimination standards usually do not limit themselves to an exclusive list of discriminatory actions, because adverse action based on prohibited grounds can take various forms depending on the facts and circumstances of the case. This rule encompasses several statutes barring discrimination. As such, the Department believes it is appropriate for this definition to encompass an array of actions that might be taken against a person on the basis of such person's exercise of the rights protected by Federal conscience and anti-discrimination laws. On the other hand, the Department agrees in part with commenters that the language ''any activity reasonably regarded as discrimination'' does not provide precise guidance on the scope of the definition. Therefore the Department will finalize the definition of ''discriminate or discrimination'' by deleting proposed paragraph (4). The Department will also change the word ''means'' to ''includes'' in the opening phrase of the discrimination definition, and change the phrase ''as permitted by the applicable statute'' to ''to the extent permitted by the applicable statute.'' This will maintain the definition's description of types of discrimination, and ensure that the definition only applies to the extent it is authorized by the applicable statute, while also rendering the descriptions in the definition non-exclusive, so OCR can consider other actions that might constitute discrimination in violation of an applicable Federal conscience and anti-discrimination law to which this part applies.

Any allegation of discrimination under the laws to which this part applies will be considered in light of a reasonable interpretation of applicable law and an application of that law to the facts. By making the definition inclusive, instead of exclusive, by use of the word ''includes,'' the definition will not exclude the types of actions that constitute discrimination but might not fall squarely into one of the descriptions set forth in paragraphs (1) to (3) of the definition. Additionally, in light of the language added to address concerns with respect to how this definition interacts with reasonable accommodations, the Department believes that making the definition inclusive, while eliminating proposed paragraph (4), ensures that the definition is not overly broad.

Comment: The Department received comments stating that the proposed definition of ''discriminate or discrimination'' conflicts with or is inconsistent with other Federal laws such as Title VII of the Civil Rights Act and Title X of the Public Health Service Act.

Response: The Department disagrees that these regulations conflict with statutes applicable to the Title X family planning program under the Public Health Service Act. The Department agrees that regulations finalized in 2000 governing the Title X program, which in some cases required referrals, information, and counseling about abortion, conflicted with certain Federal conscience and anti-discrimination laws and, consequently, with this rule. The Department acknowledged this conflict in the preamble to the 2008 Rule (73 FR at 78087), in the preamble to the notice of proposed rulemaking for the Title X regulations in 2018 (83 FR 25502, 25506 (June 1, 2018)), and in the preamble to the Title X final rule published in 2019 (84 FR 7714, 7716 (March 4, 2019)). In all three instances the Department stated it would operate the Title X program in compliance with Federal conscience and anti-discrimination laws, notwithstanding the language of the 2000 Title X regulations.[62] The

[62] In addition, in the preamble to the 2000 Title X regulations, the Department acknowledged the implications of the Church Amendment when it addressed a comment that the requirement to provide options counseling ''should not apply to employees of a grantee who object to providing such counseling on moral or religious grounds,'' and rejected it, contending that it is not necessary because, under the Church Amendments, ''grantees may not require individual employees who have such objections to provide such counseling,'' but ''in such cases the grantees must make other arrangements to ensure that the service is available

recently published Title X final rule revised the 2000 Title X regulations to eliminate that conflict and achieve consistency with Federal conscience statutes. Nothing in the Title X statute itself or in appropriations restrictions applicable to Title X funding requires abortion referrals, counseling, or information. This includes Congress's directive that, in Title X programs, ''all pregnancy counseling shall be nondirective.'' [63] That provision does not address referrals or information, only counseling, and does not require pregnancy counseling, but merely specifies that, if pregnancy counseling occurs, it shall be nondirective—and now the regulation permits, but does not require abortion counseling and information (and bars abortion referrals). Accordingly, this rule is consistent with both Title X and the Federal conscience and anti-discrimination laws.[64]

With respect to Title VII, the Department agrees with some commenters that the definition of ''discriminate or discrimination'' as proposed does not function in the same way as the approach set forth in Title VII, specifically regarding parts of the reasonable accommodation of religion standard set forth under Title VII. The Department believes components of that approach are appropriate in this context and is therefore adding a new paragraph (4) to the definition of ''discriminate or discrimination'' to properly recognize that the voluntary acceptance of an effective accommodation of protected conduct, religious beliefs, or moral convictions, will not, by itself, constitute discrimination. Further, the Department will take into account an entity's adoption and implementation of policies to accommodate objecting persons in making determinations of discrimination. The Department finds this approach appropriate because it is generally consistent with the text and intent of Federal conscience and anti-discrimination laws to respect objections based on religious beliefs by accommodating them. The Department's approach will differ from Title VII, however, by not incorporating the additional concept of an ''undue hardship'' exception for reasonable accommodations under Title VII. Despite having previously enacted Title VII, Congress did not adopt an undue hardship exception for the protections found in Federal conscience and anti-discrimination laws that are the subject of this rule. The Department believes Congress's decision to take a different approach in Title VII as compared to Federal conscience and anti-discrimination laws is consistent with the fact that Title VII's comprehensive regulation of American employers applies in far more contexts, and is more vast, variable, and potentially burdensome (and, therefore, warranting of greater exceptions) than the more targeted conscience statutes that are the subject of this rule, which are health care specific, and often procedure specific, and which are specific to the exercise of Congress's Spending Clause authority. Therefore, the Department deems it appropriate to recognize that, when appropriate accommodations are made for objections protected by Federal conscience and anti-discrimination laws, those accommodations do not themselves constitute discrimination. The Department also finds it appropriate not to adopt the undue hardship exception for enforcing Federal conscience and anti-discrimination laws because Congress chose not to place that limitation on the protections set forth in the Federal conscience and anti-discrimination laws.

Comment: The Department received comments expressing concern that the proposed definition of ''discriminate or discrimination'' would prohibit employers from accommodating religious objections by placing the conscientious objector in a different position, potentially requiring the double-staffing of certain positions.

Response: The Department agrees with this concern in part. As discussed above, the Department is adding language in response to public comments to acknowledge the reasonable accommodations that entities make for persons protected by Federal conscience and anti-discrimination laws. In this way, the Department recognizes that staffing arrangements can be acceptable accommodations in certain circumstances. The Department has addressed this through the addition of a new paragraph (4) in the definition of ''discriminate or discrimination'' that recognizes the effective and timely accommodation of an employee (which may include non-retaliatory staff rotations) as not constituting discrimination. Additionally, to address concerns raised by these commenters, the Department is adding new paragraphs (5) and (6) to clarify that, within limits, employers may require a protected employee to inform them of objections to referring for, participating, or assisting in the performance of specific procedures, programs, research, counseling, or treatments to the extent there is a reasonable likelihood [65] that the protected entity or invidivdual may be asked in good faith to refer for, participate in, or assist in the performance of such conduct, and that the employer may use alternate staff or methods to provide or further any objected-to conduct, subject to certain limitations designed to protect the objecting person.

On the other hand, as a general matter, it is not an acceptable practice under Federal conscience and anti-discrimination laws for covered entities to deem persons with religious or moral objections to covered practices, such as abortion, to be disqualified for certain job positions on that basis. For example, a hospital receiving Public Health Service Act funds could not deem a doctor or a nurse with a religious objection to performing abortions to be ineligible to practice obstetrics and gynecology on that basis. An important purpose of laws such as the Church Amendments is to prevent fields such as

to Title X clients who desire it.'' 65 FR 41270, 41274 (July 3, 2000). At the time, the Department apparently did not consider the implications of the Coats-Snowe Amendment, adopted in 1996, with respect to Title X grantees and applicants; the Weldon Amendment was adopted subsequently.

[63] See Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B, 132 Stat. 2981, 3070–71.

[64] The Department acknowledges that, as of the date of publication of this final rule, several district courts have issued preliminary injunctions, on a nationwide basis, against the enforcement or implementation of the 2019 Title X final rule, and requiring the Title X program to maintain the status quo under the 2000 Title X regulations. Those injunctions do not purport to otherwise enjoin the Department's enforcement of the Federal conscience and anti-discrimination laws. Since at least 2008, under the 2000 Title X regulations, the Department has recognized that it cannot, by regulation, require abortion counseling or referral by a Title X applicant, grantee, project, clinic, or provider where such requirement would constitute a violation of one or more of the Federal conscience and anti-discrimination laws, and the Department has stated that it operates the Title X program accordingly. The 2019 Title X final rule memorialized HHS's longstanding recognition that Federal conscience and anti-discrimination laws bar enforcement of certain requirements of the 2000 Title X regulations, but the 2019 Title X final rule did not alter HHS's preexisting policy dating back at least to 2008 of not enforcing requirements of the 2000 regulations where they may conflict with the Federal conscience statutes as explained in this rule. This rule, similarly, does not alter that status quo, but sets forth general processes for enforcement of the Federal conscience and anti-discrimination laws. The Department will implement all of its programs consistent with the Federal conscience and anti-discrimination laws and with any applicable court orders.

[65] For example, nurses assigned exclusively to nursing homes for elderly patients would not be expected to refer or assist in the performance of any sterilization procedures or abortions, and, thus, it would be inappropriate for an entity subject to the prohibitions in this rule to require such nurses to disclose whether or not they have any objections to referring or assisting in such procedures.

obstetrics and gynecology from being purged of pro-life personnel just because abortion is legal and some health care entities perform them. In this sense, the Department disagrees with commenters who essentially contend that pro-life medical personnel can be placed outside of women's health positions for that reason. The Department need not address in this rule whether a covered entity could disqualify a person with religious or moral objections to covered practices if such covered practices made up the primary or substantial majority of the duties of the position, as the Department is not aware of any instances in which individuals with religious or moral objections to such practices have sought out such jobs.

Overall, under new paragraph (6) of the definition, taking steps to use alternate staff or methods to provide for or further the objected-to conduct would not run afoul of the definition of discrimination, or constitute a prohibited referral, if the employer or program does not require any additional action by the objecting individual or health care entity and if such methods do not exclude individuals from areas or fields of practice on the basis of their protected objections. The employer may also inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct, if doing so does not constitute retaliation or other adverse action against the objecting individual or health care entity. For example, an employer may post such a notice and a phone number in a reception area or at a point of sale, but may not list staff with conscientious objections by name if such singling out constitutes retaliation.

The definition also clarifies that employers cannot use information gained from this process to discriminate against any protected entity or employee, and any attempts to, for example, ask questions of prospective employees or grant applicants concerning potential objections before hiring or a grant award will require a persuasive justification because of the risk of unlawful but difficult-to-detect ''screening'' of applicants.

The Department believes these modifications to the scope of prohibited discrimination under this final rule strike the right balance by respecting the interests of employers and entities that wish to provide services allowed by their consciences; respecting the interests, privacy, and conscience of patients and customers; and respecting the conscience of employees and health care entities protected by the laws passed by Congress that are the subject of this rule.

Comment: The Department received comments stating that the proposed definition of ''discriminate or discrimination'' would turn any adverse action taken against a protected party for any reason into *per se* unlawful discrimination.

Response: The Department disagrees. The definition of ''discriminate or discrimination'' does not trigger violations based on any adverse action whatsoever, but must be read in the context of each underlying statute at issue, any other related provisions of the rule, and the facts and circumstances. In this rule, the prohibition on discrimination is always conditioned on, and applied in the context of, violating a specific right or protection, and each protected right is typically associated with a particular Federal funding stream or streams. For example, in § 88.3(c)(2), ''discrimination'' is unlawful when done ''*on the basis that* the health care entity''—the protected entity in the provision—''does not provide, pay for, provide coverage of, or refer for, abortion.'' Thus, an adverse action taken for reasons wholly unrelated to abortion or the health care entity's actions or beliefs objecting to abortion would not constitute a violation under this provision. In addition, as noted above, whether an action is regarded as adverse is subject to a standard of reasonableness.

Comment: The Department received comments suggesting that the definition of ''discriminate or discrimination'' should not include elements of disparate impact. Because circuit courts of appeals handle disparate impact analysis differently, its inclusion here will lead to confusion and differing outcomes depending on the circuit in which the conduct occurred, and including elements of disparate impact would create incentives to manipulate data in order to bring illegitimate complaints.

Response: The Department agrees in part and disagrees in part. Because there is uncertainty about which laws, or parts of laws, implemented by this rule may or may not support a disparate impact claim, the Department is choosing to finalize the rule without explicitly including terms traditionally associated with disparate impact theories. It is specifically replacing the phrase ''adverse effects'' with ''adverse treatment'' and is deleting ''otherwise,'' ''tends to,'' and ''defeats or substantially impairs accomplishment of a health program or activity'' as elements of the definition of ''discrimination.'' However, because the definition of ''discrimination'' as adopted in this final rule is non-exclusive, as discussed above, OCR is not prejudging any complaints of violations of part 88 that are based on a claim of disparate impact, and will consider the circumstances of each complaint and apply each statute according to its text and any applicable court precedents.

Comment: The Department received comments stating that the proposed definition of ''discriminate or discrimination'' is either unconstitutional or violates precedential definitions of what constitutes discrimination.

Response: The Department disagrees that the definition of ''discriminate or discrimination'' finalized in this rule generally violates legal standards, constitutional or otherwise, as to what constitutes discrimination. There is no universal definition of discrimination that governs all Federal statutes. Discrimination can take different forms depending on the particular context and language of each statute prohibiting it. The Department nevertheless has drawn substantially from definitions and interpretations of ''discrimination'' found in other anti-discrimination statutes and case law, and has made various changes in response to public comments. The Department believes that the definition finalized here reasonably describes forms and methods of discrimination that are likely to be encountered in the context of the Federal conscience and anti-discrimination laws at issue in this rule, and that are encompassed by the protections set forth in those statutes and this rule.

Summary of Regulatory Changes: For the reasons described in the proposed rule[66] and above, and considering the comments received, the Department finalizes the definition of ''discriminate or discrimination'' (with additional minor changes for accuracy and clarity); changing ''means'' to ''includes;'' limiting the definition ''to the extent'' permitted by the statute; changing ''exclude'' to ''exclude from;'' deleting ''otherwise'' from paragraphs (1) and (2); adding ''or impose any penalty'' to the end of paragraph (2); in paragraph (3), deleting ''defeating or substantially impairing accomplishment of a health program or activity,'' changing ''tends to subject'' to ''subjects,'' and adding ''on grounds prohibited under an applicable statute encompassed by this part;'' deleting the proposed paragraph (4) and

[66] 83 FR 3880, 3892–93 (stating the reasons for the proposed definition of ''discriminate or discrimination,'' except for the modifications adopted herein).

adding new paragraph (4) as described above regarding entities that ''shall not be regarded as having engaged in discrimination;'' adding paragraph (5) as described above allowing an entity subject to any prohibition in this part to ''require a protected entity to inform them of objections;'' and adding paragraph (6) as described above addressing what actions by the entity subject to this part ''would not, by itself, constitute discrimination.''

Entity. The Department proposed that ''*Entity* means a 'person' as defined in 1 U.S.C. 1; or a State, political subdivision of any State, instrumentality of any State or political subdivision thereof, or any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State.'' The Department received comments on this definition.

Comment: The Department received comments requesting that the definition of ''entity'' include non-profit religious corporations as well.

Response: Non-profit religious corporations are already encompassed by the definition of ''person'' in 1 U.S.C. 1. *See Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

Comment: The Department received a comment noting that the definition of ''entity'' does not mention foreign governments, the United Nations, and related bodies. The comment proposed explicitly excluding foreign governments and the United Nations from the definition of ''entity'' because of sovereignty concerns.

Response: The Department agrees that the term ''entity'' should address foreign governments, foreign nongovernmental organizations, intergovernmental organizations (such as the United Nations), and related bodies, but the Department disagrees that they should be explicitly excluded. Some of the Federal conscience statutes to be enforced by the Department may implicate foreign entities,[67] but Congress did not exempt certain kinds of foreign entities that would otherwise be covered. Accordingly, the definition of ''entity'' is modified to clarify that ''entity'' may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (including the United Nations and its affiliated agencies). The Federal statutes at issue apply their protections to the funds at issue, regardless of whether those funds are awarded to domestic or foreign entities. If foreign entities wish not to be bound by these conscience protections, they may choose not to accept the relevant funds.

Comment: The Department received a comment stating that the definition of ''entity'' would permit any employer to deny its employees coverage for abortion or other objected-to services, even if otherwise required by law. Other comments expressed concern that defining ''entity'' to include State or local governments expands covered entities beyond the health care industry.

Response: The Department disagrees. The definition section must be read in conjunction with other sections of the rule when determining whether any particular entity must comply with any particular provision of the rule. For example, the fact that private employers are a type of organization that falls under the definition of ''entity'' does not make every private employer in America automatically subject to the Federal protection statutes for which this rule provides enforcement mechanisms. Similarly, the fact that natural persons fall under the definition of entity does not mean that every person in America is automatically granted protection under the rule. Rather, obligations and protections apply only to those entities that are subject to a relevant provision of a statute under the rule. Each provision in this final rule that addresses a Federal conscience statute has a paragraph titled ''*Applicability*'' (*see* § 88.3), which specifies whether an entity is subject to any given provision of a Federal statute at issue. For some statutes or some portions of statutes, the *Applicability* paragraph by its own terms may only implicate certain types of entities or only entities receiving certain types of funding.

Summary of Regulatory Changes: For the reasons described in the proposed rule [68] and above, and considering the comments received, the Department finalizes the definition of ''entity'' by including ''or, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).'' The Department also adds the term ''the Department'' to the definition of ''entity,'' for clarity.

As described further below, to ensure uniformity, the Department also modifies the definitions of ''recipient'' and ''sub-recipient'' to include, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Federal financial assistance. The Department proposed that *Federal financial assistance* align with the definition of this term in the Department's regulations implementing Title VI of the Civil Rights Act of 1964 at 45 CFR 80.13, which includes the provision of assistance of Federal funds and non-cash assistance, such as the detail of Federal personnel. The Department received comments on this term.

Comment: The Department received a comment stating that the uses of the word ''arrangement'' and the ''provision of assistance'' were difficult to interpret, and that the definition of ''Federal financial assistance'' should clarify whether it ''includes any claim for payment, payments in exchange for health care services, or applications to participate in a Federal program through which payment would be made.''

Response: The Department disagrees. The proposed definition of ''Federal financial assistance'' mirrors the definition used in the Department's regulations implementing Title VI and is intended to carry the same meaning as it has traditionally been understood to carry in the application of those regulations. *See* 45 CFR 80.13(f). The Department believes that entities subject to this regulation will be sufficiently familiar with that meaning to understand its application in this final rule. Further, numerous Federal courts have recognized that Federal financial assistance encompasses subsidies, but not fair market value compensation paid in return for services. *See, e.g., Jarno* v. *Lewis,* 256 F. Supp. 2d 499, 504 (E.D. Va. 2003); *DeVargas* v. *Mason & Hanger-Silas Mason Co.,* 911 F.2d 1377, 1382 (10th Cir. 1990); *Cook* v. *Budget Rent-a-Car,* 502 F. Supp. 494 (S.D.N.Y. 1980); *Shotz* v. *American Airlines,* 420 F.3d 1332 (11th Cir. 2005); *Venkatraman* v. *REI Systems,* 417 F.3d 418 (4th Cir. 2005). In light of the comments, the Department finalizes this definition with a minor clarifying change to avoid a circular definition, by replacing ''funds, support, or aid'' with ''subsidy'' in paragraph (5) of the definition.

Summary of Regulatory Changes: For the reasons described in the proposed

[67] Such as funds administered by the Secretary of Health and Human Services under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2); under Chapter 83 of Title 22 of the U.S. Code; or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008.

[68] 83 FR 3880, 3893 (stating the reasons for the proposed definition of ''entity,'' except for the modifications adopted herein).

rule [69] and above, and considering the comments received, the Department finalizes the definition of ''Federal financial assistance'' as proposed, with a modification in paragraph (5) to remove references to a ''Federal'' agreement and ''arrangement'' so that the text now refers to ''any agreement or other contract between the Federal government and a recipient,'' and to clarify the terminology by referring to ''provision of a subsidy to the recipient'' to avoid a circular definition related to the provision of ''assistance.''

Health care entity. The Department proposed that ''health care entity'' includes an individual physician or other health care professional; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a laboratory; an entity engaging in biomedical or behavioral research; a provider-sponsored organization; a health maintenance organization; a health insurance plan (including group or individual plans); a plan sponsor, issuer, or third-party administrator; or any other kind of health care organization, facility, or plan. The Department also proposed that the term may also include components of State or local governments. The Department proposed a single definition of the term ''health care entity,'' a term used in the Weldon Amendment, the Coats-Snowe Amendment, and ACA section 1553. The Department received comments on this definition.

Comment: The Department received a comment stating that ''health care entity'' should include social workers and schools of social work.

Response: The Department declines to make an explicit inclusion of social workers and schools of social work to the definition of health care entity. It is unclear in many circumstances that such entities deliver health care. The Department's intention in this definition is to provide a non-exclusive list of entities Congress has intended to include as a health care entity. Because the list is non-exclusive, there may be circumstances where a social worker is considered a health care entity under a Federal conscience or anti-discrimination law, but that will depend on the facts and the circumstances in each case as they arise.

Comment: The Department received comments questioning how entities that are not natural persons can hold moral or religious beliefs.

Response: Federal law routinely recognizes corporations, organizations, or other non-natural persons as holders of legal rights and subject to legal obligations. The Federal Government has long recognized the Free Speech and Free Exercise rights of non-profit organizations with charitable missions related to the religious beliefs or moral convictions of its members, and has recognized the Free Speech rights of public corporations. *Citizens United* v. *FEC,* 558 U.S. 310, 365 (2010). The definition of ''person'' that is protected under the Religious Freedom Restoration Act includes both natural and non-natural persons (corporations, partnerships, etc.).[70] In *Hobby Lobby,* having found that the text of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb–2000bb–4 (''RFRA''), does not preclude its application to corporations, the Supreme Court held that a closely held for-profit corporation can assert the religious beliefs of its owners. More specifically, from the enactment of the first paragraph of the Church Amendments in 1973, Federal conscience and anti-discrimination laws have recognized that entities such as hospitals can possess ''religious beliefs or moral convictions'' when prohibiting their facilities from being used for abortions or sterilizations. In addition, the Coats-Snowe and Weldon Amendments, and ACA section 1553, protect organizations or institutions as ''health care entities'' when they object to certain activities concerning abortion or assisted suicide without regard to the motivation for the objection. Both the Coats-Snowe and Weldon Amendments contain definitions of ''health care entity'' that include, as examples, both natural persons and corporate persons. The same is true of the definition of ''health care entity'' in ACA section 1553.

Finally, religious faith and moral convictions are often the organizing principle for entities covered in this rule, and natural persons form these organizations for the purpose of asserting their faith or convictions more forcefully and effectively in the public realm. As the Supreme Court has recognized, there is nothing about organizing in a group that diminishes the rights they would enjoy as individuals.[71] Therefore, the Department considers it appropriate to finalize the definition of health care entities to include non-natural persons.

Comment: The Department received comments stating that the proposed definition of ''health care entity'' exceeds the Department's statutory authority under the Weldon Amendment and the Coats-Snowe Amendment.

Response: The Weldon and Coats-Snowe Amendments and ACA section 1553 each provide a definition of ''health care entity'' that contains a non-exhaustive list of entities that are ''health care entities.'' The Coats-Snowe Amendment says that ''health care entity'' ''includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.'' The Weldon Amendment and ACA section 1553 state that the term ''includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.'' All three laws use the word ''includes,'' which means the lists of such entities in the definitions are non-exhaustive, and other entities could also be ''health care entities'' under the plain meaning of the term as used in those statutes. The Coats-Snowe Amendment also uses a catch-all phrase for entities in ''any other program of training in the health professions.'' The Weldon Amendment and ACA section 1553 likewise include catch-all provisions such as ''other health care professional'' and ''any other kind of health care facility, organization, or plan.'' Thus, in defining the term for purposes of this rule, it is consistent with the statutory text to list certain entities that are not explicitly

[69] 83 FR 3880, 3893 (stating the reasons for the proposed definition of ''Federal financial assistance,'' except for the modifications adopted herein).

[70] *See, e.g.,* 42 U.S.C. 2000bb–1 (''Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).''); 1 U.S.C. 1 (''In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ''person'' and ''whoever'' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.''); *Burwell* v. *Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2768 (2014) (''We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition . . . .'').

[71] *See, e.g., Hobby Lobby,* 134 S. Ct. at 2768 (''When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people [who constitute the corporation] . . . And protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.''); *Citizens United,* 558 U.S. at 391–93 (Roberts, C.J., concurring) (''[T]he individual person's right to speak includes the right to speak *in association with other individual persons* . . . [The First Amendment's] text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals.'').

mentioned in the statutes, because the statutory lists are non-exhaustive; including those entities is consistent with the plain meaning of the terms set forth in those statutes. As explained in the following discussion, however, the Department is finalizing the definition of health care entity to better conform the definition to the varying texts of the specific Federal conscience and anti-discrimination laws that use the term.

Comment: The Department received comments stating that the inclusion of ''a plan sponsor'' in the definition of ''health care entity'' would subject all employers who sponsor group health plans to the conscience statutes using that term. Other commenters contended the laws using those terms did not intend to protect plan sponsors that are not otherwise health care entities. Other commenters suggest that the term ''health care entity'' should not be the same for the Coats-Snowe Amendment, the Weldon Amendment, and ACA section 1553.

The Department received other comments supporting the inclusion of ''plan sponsor'' and ''third party administrator'' in the definition of ''health care entity.'' One comment expressed that faith-based organizations that fund health plans should not be required to fund services or procedures that violate their religious beliefs.

Response: Commenters contending that including particular types of entities in the definition of ''health care entity'' would require such entities to comply with the Coats-Snowe Amendment, the Weldon Amendment, or ACA section 1553 are incorrect. The term ''health care entity'' is used in those statutes—and in this final rule—to specify not which entity must comply with the statute, but which kinds of entities are protected from discrimination. Thus, including an entity in the term ''health care entity'' under those statutes does not expand or affect which governmental or non-governmental fund recipients must comply with those statutes.

The Department concludes it is appropriate to include ''a plan sponsor'' in the definition ''health care entity'' for purposes of the Weldon Amendment and ACA section 1553. The Weldon Amendment explicitly protects entities that do not pay for or provide coverage of abortions, and includes ''health insurance plans, or any other kind of health care facility, organization, or plan'' within its own illustrative list of protected health care entities. ACA section 1553 applies to government entities receiving Federal financial assistance under the ACA, and any health plan created under the ACA. It uses the same definition of ''health care entity'' as the Weldon Amendment, in specifying that health care entities cannot be subject to discrimination for choosing not to provide certain items or services related to assisted suicide. Because the focus of both laws includes protection of health plans, it is consistent with their language and scope to include ''a plan sponsor'' as a protected ''heath care entity.'' In the action of sponsoring a health plan or health coverage, the plan sponsor engages in an important function with respect to health care. Although the sponsor, the plan, and the issuer are all distinct entities, sponsoring a plan and paying for coverage (by an issuer, in the case of a fully insured plan) or for health care services (in the case of a self-insured plan) are part and parcel of the provision of health coverage under a group health plan. The Weldon Amendment is written to prohibit discrimination against, among others, entities that do not provide abortion in health coverage; ACA section 1553 is similarly written to protect entities from being required to provide certain health care items or services in connection with health plans and the ACA. Both laws define health care entity to include the catch-all phrase ''any other kind of health care facility, organization, or plan,'' in order to protect a broad range of entities that might be engaged in providing coverage or services and subject to discrimination for not providing or covering abortion or assisted suicide, respectively. Therefore, treating a plan sponsor as a protected health care entity is consistent with the text of the Weldon Amendment and ACA section 1553.

In further consideration of public comments, however, the Department has concluded that the definition of ''health care entity'' should be different for the Coats-Snowe Amendment than for the Weldon Amendment and ACA section 1553, including with respect to whether to include a plan sponsor. The Coats-Snowe Amendment, while providing a non-exclusive list of entities and individuals included in the term ''health care entity,'' contains a different list of entities and individuals than that set forth in the Weldon Amendment and ACA section 1553. Moreover, the nature and scope of protections set forth in the Coats-Snowe Amendment—which can assist in understanding the intended range of protected health care entities—also differ. The Coats-Snowe Amendment focuses generally on the performance of, training for, and referral for abortions, whereas the Weldon Amendment focuses more broadly on not just providing and referring for, but also providing coverage of, and payment for, abortions. Similar to the Weldon Amendment, and unlike the Coats-Snowe Amendment, ACA section 1553 focuses on the context of health plans and coverage in addition to the provision of items and services. Consequently, the Department concludes that it is appropriate to finalize a definition of health care entity for the Coats-Snowe Amendment that is somewhat different from the definition applicable to the Weldon Amendment and ACA section 1553, and to not include in the definition for purposes of the Coats-Snowe Amendment entities pertaining specifically to the health insurance and coverage context, namely, a provider-sponsored organization, a health maintenance organization, a health insurance plan (including group or individual plans), a plan sponsor, an issuer, or a third-party administrator. Likewise, the Department deems it appropriate not to list in the definition applicable to the Coats-Snowe Amendment the catch-all phrase that is in the statutory text of the Weldon Amendment and ACA section 1553: ''or third-party administrator; or any other kind of health care organization, facility, or plan.''

Otherwise, the Department deems it appropriate to include in both definitions of health care entity the proposed rule's non-exhaustive enumeration of various individual and organizational entities that engage in health care practices or services: ''an individual physician or other health care professional; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; [or] an entity engaging in biomedical or behavioral research.'' [72] Because the Department intended these entities to be health care entities, and the term ''laboratory'' could be interpreted to include laboratories that are not related to health care, the Department finalizes the term ''laboratory'' in these definitions to add the word ''medical'' to clarify its health care scope.

These entities are health care entities under the ordinary meaning of that term because they are engaged in health care practices, training, or research. They are also similar to the types of individuals and entities listed in the non-exclusive lists of health care entities in the Coats-

[72] That is not to say that certain types of health plans could not also be health care providers, *e.g.,* staff model health maintanence organizations.

Snowe Amendment, the Weldon Amendment, and ACA section 1553. All three statutes list individuals and personnel in the health professions, not just corporate entities. This demonstrates that Congress explicitly intended the term health care entity in all three to protect individuals, not just organizational entities. All three definitions also list organizational entities, and of course they all contain the basic term ''health care entity,'' which must be interpreted to encompass terms included in its ordinary meaning.

Finally, the proposed definition of ''health care entity'' concludes by specifying that it ''may also include components of State or local governments.'' To clarify the meaning of this sentence, the Department finalizes it with a change in each definition of ''health care entity,'' to read: ''As applicable, components of State or local governments may be health care entities under'' the Coats-Snowe Amendment, the Weldon Amendment, and ACA section 1553.

Comment: The Department received a comment stating that pharmacies and pharmacists are sometimes not understood to be health care providers and asking that pharmacists and pharmacies be included in the provisions of this rule.

Response: The Department accepts this recommendation and is including pharmacies and pharmacists in the definitions of ''health care entity.'' A pharmacy is a health care entity, considering the ordinary meaning of that term, because it provides pharmaceuticals and information, which are health care items and services. Regarding pharmacists, because Congress specified that the term ''health care entity'' in the Coats-Snowe Amendment, the Weldon Amendment, and ACA section 1553, includes certain individuals in the health professions, and does not provide an exclusive definition, the Department deems it appropriate to include pharmacists, who are also health care professionals. Whether a particular protection in those three laws applies to a pharmacist or pharmacy in a particular case, or whether it applies to any of the examples in these definitions, is a separate question that will be determined in the context of the factual and legal issues applicable to the situation. For the purpose of specifying whether a pharmacist or pharmacy could possibly be covered by the term health care entity in these three laws, depending on the circumstances, the Department deems it appropriate to include them in the list of individuals and entities set forth in these definitions.

Comment: The Department received comments suggesting that ''health care entity'' should include public school districts that provide on-campus medical care or manage vaccination records.

Response: The definition specifies that ''health care entity'' also includes components of State or local governments. The Department does not believe the definitions need to specify further that public school districts providing on-campus medical care are included. The Department will evaluate the applicability of the rule to public school entities with health care functions according to the facts and circumstances of each case as they arise and the applicable laws.

Comment: The Department received a comment proposing that ''health care entity'' exclude occupational therapists.

Response: To the extent that occupational therapists are health care personnel qualifying as ''other health care professionals,'' the Department disagrees that they would be necessarily excluded from protection. While some questions concerning who qualifies for protection in a particular circumstance are relatively straightforward, such as physicians under certain conscience protection laws, some questions are closer and depend on the facts and the applicable law. The Department, therefore, declines to make explicit exclusions, such as for occupational therapists, to the definitions of health care professionals, and will instead consider individual cases based on the facts and circumstances presented in each case as they arise and the applicable law.

Comment: The Department received comments stating that the inclusion of ''health care personnel'' exceeds the definition of ''health care entity'' under the Weldon Amendment or other laws using that term.

Response: The Department disagrees. The list of individuals, persons and entities included as a ''health care entity'' in the Weldon Amendment and ACA section 1553 includes ''an individual physician,'' and also the catch-all phrases ''or other health care professional.'' The Coats-Snowe Amendment says the term includes ''individual physician'' and ''a participant in a program of training in the health professions.'' Because the term ''health care entity'' includes individuals, and the definitions are non-exclusive, the Department deems it appropriate to include other individuals who are health care personnel. Including ''health care personnel'' and/or ''health care professional'' in the definition of ''health care entity'' is, therefore, consistent with Congress's explicit inclusion of individual persons in the health care field. Doing so effectuates the remedial purposes of the Coats-Snowe Amendment, the Weldon Amendment, and ACA section 1553, and is consistent with their texts.

Comment: The Department received comments requesting that ''health care professional'' and ''health care personnel'' be defined terms.

Response: The Department declines to define these terms. The Department believes it is appropriate to determine remaining potential questions about the scope and application of the term ''health care entity'' based on an analysis of facts and circumstances presented in each case as they arise. Regarding health care professionals, State and local law might also be relevant concerning which persons are considered health care professionals. Because those laws differ, the Department considers it appropriate not to specify a single definition of health care professional or health care personnel in this rule. Parts of the Church Amendments use the terms ''personnel'' and ''health care personnel,'' but do not define those terms. Although this rule also does not define those terms, the Department believes this rule provides some additional clarity to the application of Federal conscience and anti-discrimination laws.

Summary of Regulatory Changes: For the reasons described in the proposed rule [73] and above, and considering the comments received, the Department finalizes the definition of ''health care entity'' with changes to bifurcate the definition into two: One applicable for purposes of the Coats-Snowe Amendment, and the other applicable for purposes of the Weldon Amendment and ACA section 1553. Both definitions add pharmacies and pharmacists. Both add the word ''medical'' before the term ''laboratory'' to more clearly describe its health care scope, and both note that ''as applicable, components of State or local governments may be health care entities.'' The definition applicable to the Coats-Snowe Amendment omits the terms ''a provider-sponsored organization; a health maintenance organization; a health insurance plan (including group or individual plans); a plan sponsor, issuer, or third-party administrator; or any other kind of

[73] 83 FR 3880, 3893 (stating the reasons for the proposed definition of ''health care entity,'' except for the modifications adopted herein).

health care organization, facility, or plan.''

Health program or activity. The Department proposed that ''*Health program or activity*'' includes the provision or administration of any health-related services, health service programs and research activities, health-related insurance coverage, health studies, or any other service related to health or wellness, whether directly through payments, grants, contracts, or other instruments, through insurance, or otherwise.

Under the proposed rule the terms ''health program or activity'' and ''health service program'' differed mainly in that the former included ''the provision or administration of any health-related services,'' while the latter included any ''plan or program that provides health benefits.'' Because ''health service program'' could be seen as narrower, the phrase health program or activity incorporated ''health service program'' explicitly as part of its definition. The Department asked for comment ''on whether the terms mean the same thing and should or could be defined interchangeably for purposes of this regulation.'' [74]

The Department did not receive specific comments on this question, but the comments received regarding the two definitions generally treated the two phrases as identical. Upon further consideration the Department has concluded that there are insufficient grounds for defining such similar terms differently under the rule.

The Department is finalizing the rule without defining ''health program or activity'' because other revisions have eliminated the use of the phrase in the regulation text as finalized. However, for reasons explained below, the Department adopts (with minor edits) the definition proposed for ''health program or activity'' as the definition for ''health service program.'' All questions and responses to comments concerning ''health program or activity'' apply fully and ''transfer'' to ''health service program.''

Comment: The Department received comments stating that the definition of ''health program or activity'' should explicitly include vaccination programs or the processing of vaccination records.

Response: Because of the broad scope of what could constitute a ''health program or activity'' (now ''health service program''), the Department declines to attempt a comprehensive listing of examples of such programs or activities and instead relies on the general standard proposed. The Department believes vaccination programs would reasonably be considered a health program or activity (or a health service program) and notes that one of the statutes that is the subject of this rule concerns vaccination explicitly (42 U.S.C. 1396s(c)(2)(B)(ii)).

Comment: The Department received comments stating that the definition of ''health program or activity'' (now ''health service program''), when combined with the definition of ''assist in the performance'' and ''refer,'' could result in disparate impact against women, LGBT persons, and religious minorities.

Response: The Department disagrees. This rule implements underlying statutory requirements and prohibitions set forth by Congress. The terms defined in this rule do not apply to women, LGBT persons, or religious minorities in any way that differs from how Congress applied the terms in the statutes it adopted. To the extent commenters contend that some Federal conscience and anti-discrimination laws themselves adversely impact women because they concern abortion, the Department disagrees, but is in any event required to implement and enforce Federal conscience and anti-discrimination laws as Congress wrote them.

Comment: The Department received comments stating that the definition of the term ''health program or activity'' (now ''health service program''), is overly broad; and, when combined with section 104A of the Foreign Assistance Act of 1961, could result in otherwise unauthorized discrimination against minority groups or persons in sex trafficking in programs funded under section 104A.

Response: The Department disagrees. The relevant language of section 104A, ''any program or activity'' (22 U.S.C. 7631(d)(1)(B)), is broader than, and clearly includes, any ''health service program.'' As the Department only administers section 104A funds (as relevant to this rule) with respect to health, the definition of ''health program or activity'' is not intended to limit, and in no way limits, any protection from discrimination provided in section 104A of the Foreign Assistance Act of 1961. Additionally, nothing in 22 U.S.C. 7631(d)(1)(B) exempts certain programs or activities from its conscience protections.

Summary of Regulatory Changes: For the reasons described in the proposed rule,[75] above and below, and considering the comments received, the Department adopts the definition of ''health program or activity'' as proposed as the definition of ''health service program,'' except makes a technical edit for clarity by replacing commas with semicolons after ''directly,'' the phrase ''through payments, grants, contracts, or other instruments,'' and after ''through insurance.'' Additionally, it deletes the reference to ''health service program'' from the proposed definition as circular.

Health service program. The Department proposed that ''Health service program includes any plan or program that provides health benefits, whether directly, through insurance, or otherwise, and is funded, in whole or part, by the Department. It may also include components of State or local programs.'' The Department received comments on this definition.

Comment: The Department received comments stating that the definition of ''health service program'' expands the scope of the Federal conscience and anti-discrimination laws ''to include virtually any medical treatment or service, biomedical and behavioral research, and health insurance.''

Response: The Department disagrees. Among the statutes that are the subject of this rule, the phrase ''health service program'' appears only once, in paragraph (d) of the Church Amendments. That paragraph addresses the right of persons to decline to ''perform or assist in the performance'' of ''any part'' of a health service program or research activity funded in whole or in part under a program administered by the Secretary of HHS if such performance or assistance would be contrary to the person's religious beliefs or moral convictions. Many commenters' objections to this definition are fundamentally objections to the text of paragraph (d) of the Church Amendments as passed by Congress. The Department believes that other commenters may misunderstand the scope of paragraph (d). Generally, the protections of paragraph (d) follow the funds provided by any program administered by the Secretary. But paragraph (d) does not encompass every medical treatment or service performed by any entity receiving Federal funds from HHS for whatever purpose. Instead, Congress narrowly focused paragraph (d) to prohibit the coercion of persons ''in performance of'' health service programs funded under a program administered by the Secretary. Many medical treatments and services performed by health care providers are not ''part of'' a health service program receiving funding from HHS. In such

[74] 83 FR 3880, 3894.

[75] 83 FR 3880, 3893–94 (stating the reasons for the proposed definition of ''health program or activity,'' except for the modifications adopted herein).

circumstances, paragraph (d) would not apply.

This distinction can be illustrated by considering the parallel term used in paragraph (d), ''research activity.'' For example, if an entity receives a grant from a program administered by HHS to conduct research on a new cancer treatment, paragraph (d) of the Church Amendments would protect individuals involved in the performance of any part of that research activity. But if the entity engages in other research activities that are not funded by HHS (*i.e.,* not related to the cancer treatment for which the research grant was issued in this example), paragraph (d) would not apply to those other activities. This would hold true even if other statutory provisions that are the subject of this rule would apply to those other research activities.

Similarly, Medicaid is funded in whole or in part under a program administered by the Department. Nevertheless, if a health care provider receives Medicaid reimbursements for some medical treatments, but is providing other medical treatments that are not being reimbursed by Medicaid or otherwise funded by the Department, the provider—with respect to the non-Medicaid treatment—is not performing ''part of a health service program'' funded by a program administered by HHS. Because Medicaid generally provides reimbursements for particular treatments, not for a medical practice overall, providing a treatment not reimbursed by Medicaid would generally not be ''part of a health service program . . . funded in whole or in part under'' Medicaid for the purposes of paragraph (d) of the Church Amendments, even if the overall medical practice also receives Medicaid reimbursements for other treatments.

The Department intends to enforce paragraph (d) of the Church Amendments consistent with the text of the statute. It would be inappropriate for the Department to define ''health service program'' to exclude programs that involve health services and that are funded (in whole or in part) under a program administered by HHS, when Congress specified that paragraph (d) of the Church Amendments covers such programs. The Department believes that the specific limitations in paragraph (d) concerning the circumstances in which it applies has already (under the statute) prevented the realization of many overbreadth concerns raised by commenters, and will continue to do so under this rule, notwithstanding the plainly broad meaning of the term ''health service program'' itself.

Comment: The Department received a comment stating that the definition of ''health service program'' should only apply in the context of biomedical research.

Response: The Department disagrees. Congress used the disjunctive phrase ''health service program or research activity'' in paragraph (d) of the Church Amendments. Nothing in the phrase or its context (the surrounding text) indicates that the protection provided by Congress is limited only to biomedical research. If ''health service program'' meant only research activities, then Congress's addition of ''or research activity'' would be superfluous. Further, in a separate provision of the Church Amendments enacted at the same time as paragraph (d), paragraph (c)(2), Congress provided specific prohibitions for entities that receive grants or contracts ''for biomedical or behavioral research'' alone, without including health service programs. This demonstrates that Congress's inclusion or omission of ''health service program'' was a considered decision intended to have substantive effect.

Summary of Regulatory Changes: The Department asked for comment on whether ''health program or activity'' and ''health service program'' should or could be defined interchangeably for purposes of this regulation [76] but received no specific comments on the question. Upon further consideration the Department has concluded that there are insufficient grounds for defining such similar terms differently under the rule.

The Department's definition for ''health service program'' in the proposed rule mirrored the definition of the term in the 2008 Rule.[77] The 2008 Rule, in turn, incorporated the phrase ''health benefits'' into the definition of ''health service program'' by borrowing from Section 1128B(f)(1) of the Social Security Act's (42 U.S.C. 1320a–7b(f)(1)) definition of ''Federal health care program''—the rationale being that ''Federal health care program'' was similar enough to ''health service program,'' to warrant the borrowing. With respect to the inclusion of ''health benefits,'' in the definition of ''health service program,'' this was appropriate because the Federal health service programs implemented under the Social Security Act are programs administered by the Secretary—and, thus, consistent with the language of the Church Amendment. However, the Social Security Act is not (and was not) the exclusive basis for defining the scope of ''health service program.'' The Department believes that it is also appropriate to consider the Public Health Service Act (PHSA) as a source for defining the term ''health service program'' because, (1) the Church Amendments themselves cite the PHSA to help establish what programs are covered and (2) the PHSA uses the phrase ''health service program'' and ''health services'' numerous times. For example, the PHSA provides grant authority to assist States and other public entities ''in meeting the costs of establishing and maintaining preventive health service programs'' (42 U.S.C. 247b), and grants the Secretary permission to enter into contracts to ''furnish health services to eligible Indians'' (42 U.S.C. 238m).

The terms ''health services'' and ''health service program,'' as used by the PHSA, clearly include the provision of health care or health benefits, but they also include health-*related* services. For example, the PHSA uses the phrase ''environmental health services'' to describe programs that deal with the detection and alleviation of ''unhealthful conditions'' associated with water supply, chemical and pesticide exposures, air quality or exposure to lead. 42 U.S.C. 254b(b)(2)(C). These are health-related programs. Moreover, the PHSA uses the phrase ''health service programs'' explicitly and includes ''preventive'' programs within its ambit including—for example, programs for ''the control of rodents'' and ''for community and school-based fluoridation programs.'' 42 U.S.C. 300w–3(a)(1)(B). These are health-related programs.

In light of the above, and for the sake of consistency and to avoid confusion, the Department finalizes the term ''health service program'' as equivalent to ''health program or activity'' (with minor changes). The Department is no longer including a definition of ''health program or activity'' but in light of public comments, is finalizing a definition of ''health service program'' with changes that incorporate some of the elements of both terms, based on concerns raised about both definitions in the public comments. The finalized definition states that ''health service program includes the provision or administration of any health or health-related services or research activities, health benefits, health or health-related insurance coverage, health studies, or any other service related to health or wellness, whether directly; through payments, grants, contracts, or other instruments; through insurance; or otherwise.''

[76] 83 FR 3880, 3894.

[77] *Id.*

Individual. The Department proposed that ''*Individual* means a member of the workforce of an entity or health care entity.'' The Department received comments on this definition.

Comment: The Department received a comment stating that the definition of ''individual'' should include ''persons exercising their right of informed consent to decline a healthcare service on the basis of religion or conscience.''

Response: Upon considering this comment and reviewing the use of the word ''individual'' throughout the proposed rule, the Department agrees that the term has multiple meanings depending on the context of its use in the rule and in applicable statutes. Sometimes it refers to members of the workforce of an entity or health care entity, and other times it refers to persons who are not health care providers and yet are protected by the Federal conscience and anti-discrimination laws at issue in this rule, such as an individual who makes use of a religious nonmedical health care institution or an individual who ''is conscientiously opposed to acceptance of the benefits of any private or public insurance.'' Because ''individual'' has multiple meanings throughout the rule, and the meaning of ''individual'' is clear in each instance from its context, the inclusion of a definition for ''individual'' introduces unnecessary confusion. Consequently, the Department is deciding not to finalize the proposed definition, or any definition, of the word ''individual'' in the final rule. As ''individual'' is no longer a defined term, additional comments on the definition of the word ''individual'' are either addressed by that change, or not necessary to address further.

Summary of Regulatory Changes: For the reasons described above, and considering the comments received, the Department does not finalize the proposed definition of ''individual'' and removes the word ''individual'' and its definition from the list of defined terms.

Instrument. The Department proposed that ''*Instrument* is the means by which Federal funds are conveyed to a recipient, and includes grants, cooperative agreements, contracts, grants under a contract, memoranda of understanding, loans, loan guarantees, stipends, and any other funding or employment instrument or contract.'' The Department did not receive comments on this definition.

Summary of Regulatory Changes: For the reasons described in the proposed rule [78] and above, the Department adopts the definition of ''instrument'' as proposed.

OCR. The Department proposed that OCR means the Office for Civil Rights of the Department of Health and Human Services. The Department did not receive comments on this definition.

Summary of Regulatory Changes: For the reasons described in the proposed rule [79] and above, the Department adopts the definition of ''OCR'' as proposed.

Recipient. The Department proposed that ''*Recipient* means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, and any person or any public or private agency, institution, organization, or other entity in any State including any successor, assign, or transferee thereof, to whom Federal financial assistance is extended directly from the Department or a component of the Department, or who otherwise receives Federal funds directly from the Department or a component of the Department, but such term does not include any ultimate beneficiary. The term may include foreign or international organizations (such as agencies of the United Nations).'' The Department received comments on this definition.

Comment: The Department received a comment stating that while the proposed definition of ''recipient'' recognizes that an individual or organization must comply with the provider conscience regulations if the individual or organization receives funds ''directly from the Department or component of the Department' to carry out a project or program,'' the proposed rule does not explain how ''compliance with the regulations would not be required for products or services offered by the individual or organization that are unrelated to the Federal funding.''

Response: Fitting within the definition of a ''recipient'' alone does not necessarily subject an entity to all of the requirements of the statutes implemented through this rule. In each paragraph of § 88.3 of this rule, there is an ''*Applicability*'' paragraph and a ''*Requirements and prohibitions*'' paragraph that describe, in more particularity for each Federal conscience and anti-discrimination law being implemented by the paragraph, the scope of the statute and, thus, this regulation.

As discussed concerning the definition of the term ''entity,'' the Department is finalizing the terms ''entity,'' ''recipient,'' and ''sub-recipient'' with parallel language to clarify that they all may encompass ''a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).''

Summary of Regulatory Changes: For the reasons described in the proposed rule [80] and above, and considering the comments received, the Department finalizes the definition of ''recipient'' with a change to the last sentence, so that rather than referring only to ''foreign or international organizations,'' it reads ''The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).''

Referral or *refer for.* The Department proposed that ''Referral or refer for'' be defined as including the provision of any information (including but not limited to name, address, phone number, email, website, instructions, or description) by any method (including but not limited to notices, books, disclaimers or pamphlets online or in print), pertaining to a health care service, activity, or procedure, including related to availability, location, training, information resources, private or public funding or financing, or directions that could provide any assistance in a person obtaining, assisting, training in, funding, financing, or performing a particular health care service, activity, or procedure, when the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral. The Department received comments on this definition, including general comments in support of and opposition to the proposed definition.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' should be maintained as it appropriately allows healthcare professionals to abide by their own professional and ethical judgments.

Response: The Department agrees that the definition of ''referral or refer for'' is appropriate, except for the addition of relatively minor narrowing and clarifying changes as discussed below.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' exceeds the scope of the Weldon Amendment or the Coats-Snowe Amendment.

[78] 83 FR 3880, 3894.

[79] 83 FR 3880, 3894.

[80] 83 FR 3880, 3894 (stating the reasons for the proposed definition of ''recipient,'' except for the modifications adopted herein).

Response: The Department disagrees. Neither the Weldon nor Coats-Snowe Amendment defines ''referral'' or ''refer for.'' The definition is a reasonable interpretation of these terms and faithfully effectuates the text and structure of Congress's protection of health care professionals and entities from being coerced or compelled to facilitate conduct (with respect to Weldon and Coats-Snowe, concerning abortion) that may violate their legally protected rights through the forced provision of referrals. For example, in the Weldon Amendment and section 1303 of the ACA, Congress did not merely protect the action of declining to refer to an abortion provider, but of declining to refer ''for'' abortions generally. This more broadly protects a decision not to provide contact information or guidance likely to assist a patient in obtaining an abortion elsewhere.

The rule's definition of ''referral'' or ''refer for'' also comports with dictionary definitions of the word ''refer,'' such as the Merriam-Webster's definition of ''to send or direct for treatment, aid, information, or decision.'' *Refer, Merriam-Webster.com*, available at *https://www.merriam-webster.com/dictionary/refer* (last accessed April 9, 2019) (emphasis added); *see also Refer, Dictionary.com*, available at *https://www.dictionary.com/browse/refer* (last accessed April 9, 2019) (defining *refer* as ''to direct for information or anything required'' and ''to hand over or submit for information, consideration, decision, etc.'').

This interpretation properly serves the remedial purposes of these protections. Recent attempts at coerced referrals for abortion, such as California's Reproductive FACT Act, have taken the form of compelled display of information discussing the availability of State-subsidized abortions. The purpose, design, and effect of such displays of information is precisely to assist patients in obtaining abortions if they so choose. As discussed elsewhere in this rule, OCR found that the FACT Act's compelled display of such information to members of the public is a type of referring or referral ''for'' abortion that Congress prohibited in the Weldon and Coats-Snowe Amendments.[81]

Nevertheless, the Department has made significant modifications to the definition of ''discrimination'' that address the concerns raised by commenters concerning the definition of referral. Specifically, the Department recognizes greater latitude for accommodation procedures by employers and entities and has added additional exclusions and exemptions under the rule. In doing so, the rule narrows the scope of possible bases of a violation under the rule.

For example, the rule allows an employer, when there is a reasonable likelihood it may ask its employees in good faith to refer for, participate in, or assist in the performance of potentially objected to conduct, to require its employee to inform it of any objections. Thus, a hospital that regularly performs elective abortions may ask a nurse hired to work in the OB/GYN department if he or she anticipates having any objections to assisting in the performance of elective abortions to allow the hospital to make appropriate, non-discriminatory staffing arrangements. Barring other facts, if the nurse refuses to answer, the Department would not treat any resultant adverse action by the employer against the nurse as ''discrimination'' under the rule.

These significant changes to the rule's definition of discrimination respect the laws provided by Congress and the interests of all parties—employers, health care entities, and individual physicians—who wish to provide services allowed by law according to their consciences.

Additionally, the Department agrees that some proposed terms in the definition of refer or referral were unnecessarily broad, and therefore the Department finalizes the definition with narrowing edits as set forth in response to comments regarding specific phrases discussed below.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' would interfere with legal and ethical duties of doctors to provide information to their patients.

Response: The Department disagrees. The rules do not prohibit any doctor or health care entity from providing information to their patients—or referring for a medical service or treatment—if they feel they have a medical, legal, ethical, or other duty to do so. The rules simply enforce existing laws that prevent doctors or other protected entities from being forced to refer for abortions against their will or judgment. The rule's definition of ''referral or refer for'' ensures that doctors can use their own professional, medical, and ethical judgment without being coerced by entities receiving Federal funds to violate their moral or religious convictions. To the extent a State subject to this rule (under, for example, the Coats-Snowe Amendment or the Weldon Amendment) legally mandates that protected individuals and entities refer for abortion, Congress has indicated such mandates are inconsistent with Federal law.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' would violate the requirement that patients receive informed consent before performing treatments.

Response: A similar objection is discussed above concerning the definition of ''assist in the performance'' and its inclusion of referrals. The Department disagrees with the objection. Federal conscience and anti-discrimination laws specifically shield certain persons and entities from being required to provide referrals for abortion. Indeed, medical ethics have long protected rights of conscience alongside the principles of informed consent. The Department does not believe that enforcement of conscience protections, many of which date to the era of *Roe* v. *Wade* and *Doe* v. *Bolton,* violates or undermines the principles of informed consent. This final rule will not change existing laws requiring doctors to secure informed consent from patients before performing medical procedures.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' conflicts with Title X of the Public Health Service Act.

Response: As discussed above, the Department concluded in 2008 and again in the preamble to the proposed rule in this rulemaking that the 2000 Regulations governing the Title X program, which required Title X projects and providers to provide abortion counseling, information and referrals in certain circumstances, conflict with certain Federal conscience and anti-discrimination laws. Notably, that requirement was imposed by the Department, not by Congress in Title X itself, which has long prohibited the use of Title X funds ''in programs where abortion is a method of family planning.'' 42 U.S.C. 300a–6. The Department has amended the Title X regulations to remove the requirements for abortion counseling, information, and referrals, while permitting the provision of nondirective counseling on, and information about, abortion. Under the 2019 final rule governing the Title X program, the Title X regulations no longer conflict with Federal conscience and anti-discrimination laws or this final rule. Regardless, as the Department

[81] Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal. (Jan. 18, 2019), *available at https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.*

recognized in the 2008 Rule, a Federal regulatory requirement that a Title X applicant, grantee, program, or clinic—a recipient of Federal funds in carrying out a HHS program—provide abortion counseling, information, and referrals cannot be enforced against such entities whose refusal to do so is protected by applicable Federal conscience and related nondiscrimination statutes.

Comment: The Department received comments stating that including ''the provision of any information . . . by any method'' in the definition ''referral'' or ''refer for'' goes beyond the meaning of those words in the statutes.

Response: The definition's breadth reflects the fact that conscientious objections to, or the nonperformance of, acts that facilitate the conduct of a third party may take many forms and occur in many contexts. Nevertheless, the Department agrees that the phrases ''any information'' and ''any method'' as well as ''any assistance'' are unnecessarily broad, and therefore deletes the three appearances of the word ''any'' from the definition. The rule instead relies on the non-exhaustive list of illustrations to guide the scope of the definition. Additionally, the rule permits the description of specific methods of transmitting information, namely, ''any method (including but not limited to notices, books, disclaimers or pamphlets, online or in print),'' and replaces the list with the clearer and more concise statement of ''in oral, written, or electronic form.''

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' could permit a provider to turn away a patient experiencing complications from an objected-to medical drug, device, or service without providing any information.

Response: To the extent the comments concern providers that decline to volunteer certain information or make referrals to other providers, the applicability of the rule would turn on the individual facts and circumstances of each case. In making a determination, the Department will consider the relationship between the treatment subject to a referral request and the underlying service or procedure giving rise to the request. The Department, however, is not aware of any providers that would refuse to treat or refer a person with unforeseen and unintended complications arising from, for example, an abortion procedure that the provider would not perform.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' could result in a health care professional refusing to refer a woman for treatment of ovarian cancer because sterilization would be a ''possible outcome of the referral.''

Response: The Department agrees that ''possible outcome of the referral'' is unnecessarily broad. The Department is therefore changing the word ''possible'' to ''reasonably foreseeable,'' which still recognizes robust protection to conscientious objectors as provided by Congress, but requires a stronger connection between the referral and the objected-to activity or result. The Department also finalizes the definition with a change to eliminate subjective language concerning what an entity ''sincerely understands'' out of similar concerns about overbreadth.

Comment: The Department received a comment suggesting that ''referral or refer for'' should be defined as ''active facilitation of access.''

Response: The Department disagrees and believes such a definition would risk improperly narrowing the protections provided by Congress. For example, California's Reproductive FACT Act (which the Supreme Court ruled in *NIFLA* likely violates the Constitution, 138 S. Ct. at 2371–76), involved a requirement that health care facilities opposed to abortion tell women that the State may provide free or low cost abortion, and provide the women a phone number for further information on how to access those abortions. After investigating complaints related to the FACT Act, the Department found that mandating the communication of such information to members of the public is a type of referring or referral ''for'' abortion that Congress prohibited in conscience protection statutes.[82] Narrowing the definition to the ''active facilitation of access'' may subject many health care providers to coercive requirements that the Department has already found violate the law. The definition finalized here better includes the full range of referral activities protected by Congress.

Comment: The Department received comments stating that the definition of ''referral or refer for,'' when applied to employees of health plans, could hinder people who are attempting to determine what services are covered by their insurance plans and what doctors are in their plans or could be used to not process claims for objected-to services under a health plan. The comments suggested limiting conscience protections to health plans themselves rather than including the plans' employees, exempting administrative tasks performed by a health plan's employees, or limiting the definition of ''referral or refer for'' to not include health plans or their employees.

Response: The Department replaced paragraph (4) to the definition of ''discriminate or discrimination'' to make clear that employers can use, and are encouraged to pursue, accommodation procedures with protected employees. Additionally, the Department added paragraphs (5) and (6) to the definition of discrimination to clarify that, within limits, employers may require protected employees to inform them of objections to referring for, participating in, or assisting in the performance of specific procedures, programs, research, counseling, or treatments to the extent there is a reasonable likelihood[83] that the protected entity or member may be asked in good faith to refer for, participate in, or assist in the performance of such conduct.

Consistent with the terms of paragraphs (5) and (6) of the definition of discrimination regarding advance notice by an employee of the potential for a conscientious objection, an employer may similarly require an employee to notify them in a timely manner of an actual conscientious objection that the employee has to a specific act, in the day-to-day course of work, that the employee would otherwise be expected to perform.[84]

[82] Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal. (Jan. 18, 2019), *available at https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf.*

[83] For example, nurses assigned exclusively to nursing homes for elderly patients would not be expected to refer or assist in the performance of any sterilization procedures or abortions, and thus, it would be inappropriate for an entity subject to the prohibitions in this rule to require such nurses to disclose whether or not they have any objections to referring or assisting in such procedures.

[84] The Department notes material legal and factual distinctions between, on the one hand, an employer requiring an employee to notify it of a conscientious objection covered by this rule and, on the other, the accommodation process for religious employers in the Department's previous regulations mandating employer coverage of contraception and sterilization. 80 FR 41318 (July 14, 2015). Numerous religious organizations brought challenges under RFRA concerning the ''accommodation'' process promulgated under those rules. RFRA prevents the Federal Government from substantially burdening a person's religious exercise unless in furtherance of a compelling governmental interest and in the manner least restrictive of that exercise. Under the accommodation, objecting religious organizations that self-insured would have been required to notify either the third-party administrator of their health plan, via a certain prescribed form, or HHS, via a letter containing certain prescribed information, of their objection to including contraception and sterilization in their health plans. Plaintiffs in those cases argued that providing such notice would itself have violated their religious beliefs. But a crucial element of the plaintiffs' argument in the context

Continued

Employers and programs that subsequently take steps to use alternate staff or methods to provide for or further the objected-to conduct would not be considered to engage in discrimination—nor would the requirement for the objecting entity to provide notice to the employer or program be considered a referral—if the employer or program does not take any adverse action against the objecting person or entity, if such methods do not exclude persons from fields of practice on the basis of their protected objections, and if the employer or program does not require any additional action by the objecting person or entity beyond the provision of notice discussed above. The employer may also inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct if it does not constitute taking any adverse action against the objecting person or entity.

The Department believes that incorporating these significant limitations to the scope of discrimination and, thus, addressing issues that may arise for an employer when a health care entity objects to making a referral, solves concerns such as those raised by this comment.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for,'' because it applies to public notices, would prohibit California's Reproductive FACT Act, ''which requires facilities specializing in pregnancy-related care to disseminate notices to all clients about the availability of public programs that provide free or subsidized family planning services, including prenatal care and abortion.''

Response: As discussed above, the Department has already found that the FACT Act violated the Weldon and Coats-Snowe Amendments, and the Supreme Court, in *NIFLA,* 138 S. Ct. at 2371–76, ruled that it likely violates the First Amendment's free speech protections for targeting pro-life health care entities and compelling them to provide information about how to obtain abortions.

Comment: The Department received comments stating that the proposed definition of ''referral or refer for'' conflicts with the DeConcini Amendment, which states, ''[I]n order to reduce reliance on abortion in developing nations, funds [to carry out the provisions of chapters 1 and 10 of part I of the Foreign Assistance Act of 1961] shall be available only to voluntary family planning projects which offer, either directly or through referral to, or information about access to, a broad range of family planning methods and services'' (Consolidated Appropriations Act, 2019, Public Law 116–6, Div. F, sec. 7018).

Response: The Department disagrees. The DeConcini Amendment's reference to ''a broad range of family planning methods and services'' does not include abortion. Rather, the amendment itself contrasts abortion with that broad range of family planning methods and services and excludes abortion as a method of family planning. Another proviso bars the use of ''funds made available under this Act . . . to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions'' and ''[t]hat nothing in this paragraph shall be construed to alter any existing statutory prohibitions against abortion under section 104 of the Foreign Assistance Act of 1961.'' The Department believes the best reading of that amendment is that the broad range of family planning methods and services is viewed as an alternative to abortion, not that the amendment mandates referrals for abortion as if they are part of family planning. In the context of foreign assistance, since the 1980s, four different presidential administrations have implemented policies to prohibit foreign assistance for family planning to go to entities that perform or actively promote abortion as a method of family planning, and Congress has been aware of those policies.[85] Furthermore, the DeConcini Amendment's discussion of a broad range of family planning methods and services is nearly identical to the scope of the Title X statute, 42 U.S.C. 300. In that context, Congress made clear that it does not consider abortion to be a method of family planning and, in fact, prohibits the use of Federal funds in programs where abortion is a method of family planning. *See* 42 U.S.C. 300–6.

Comment: The Department received comments stating that the definition of ''referral or refer for'' could permit a health care provider to refuse to ever refer a patient to an OB/GYN for any reason because a future possible outcome of such a referral could be that the patient seeks an abortion or sterilization from the OB/GYN, even though the direct referral is not for such service.

Response: The commenters' concerns seem far-fetched, but are, nevertheless, addressed by the change from the word ''possible outcome'' to ''reasonably foreseeable outcome,'' which requires a stronger connection between the referral and the objected-to conduct. The Department does not find there to be reason to foresee that objectors would use the Weldon or Coats-Snowe Amendments or these rules to refuse to refer women to every OB/GYN.

Summary of Regulatory Changes: For the reasons described in the proposed rule[86] and above, and considering the comments received, the Department finalizes the definition of ''referral or refer for'' with changes as described above. The comments lead the Department to believe the text as originally proposed was unduly long, confusing, and repetitive and therefore finalizes the definition with numerous stylistic changes and deletions and nonsubstantive reordering of text to substantially improve readability. The Department also finalizes the rule to clarify that assistance related to a ''program'' is also encompassed by the definition in order to track the use of that phrase in statutes, including the Weldon and Coats-Snowe Amendments,

of self-insured plans was that the notice, via either method, was a prerequisite without which the plan's third-party administrator would lack legal authority to deliver the objected-to coverage. ''If a self-insured religious organization uses Form 700, the form becomes 'an instrument under which the plan is operated [and is] treated as a designation of the [third-party administrator] as the plan administrator under section 3(16) of ERISA[, 29 U.S.C. 1002(33),] for any contraceptive services required to be covered. 29 CFR 2510.3–16(b). Form 700 authorizes the [third-party administrator] to 'provide or arrange payments for contraceptive services . . . 29 CFR 2590.715–2713A(b)(2) . . . If the self-insured religious organization instead self-certifies by HHS Notice, DOL's ensuing notification to the [third-party administrator] also operates to 'designate' the [third-party administrator] 'as plan administrator' under ERISA for contraceptive benefits. 79 FR at 51095; see also 29 CFR 2510.3–16(b).'' *Sharpe Holdings* v. *U.S. Dept. of Health & Human Services,* 801 F.3d 927, 935 (8th Cir. 2015). The provision of notice triggered coverage of the objected-to contraceptives by the religious employer's third party administrator, thus—in the eyes of the objecting religious employers—making them complicit in a grave wrong.

The provision of notice by an employee to her employer differs from the accommodation's notice requirement in key respects. First, absent unusual circumstances, burdens placed by a private employer on an employee's religious exercise would not be subject to the stringent demands of RFRA. Second, under the accommodation, the third-party administrator of an objecting employer's self-insured plan would have had no legal obligation to provide the objected-to coverage absent the employer's provision of notice, but if under this rule an objecting employee refuses to provide her employer with notice of her objection, her employer would nevertheless retain its authority and ability to provide the objected-to service without the employee's involvement.

[85] U.S. Policy Statement for the International Conference on Population, 10 Population & Dev. Rev. 574, 578 (1984) (reproducing the Policy Statement of the United States of America at the United Nations International Conference on Population, also known as the Mexico City Policy).

[86] 83 FR 3880, 3894–95 (stating the reasons for the proposed definition of ''referral or refer for,'' except for the modifications adopted herein).

that protect against forced referrals in certain programs. The revised definition includes the provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web addresses, directions, instructions, descriptions, or other information resources), where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure.

State. The Department proposed that ''*State* includes, in addition to the several States, the District of Columbia. For those provisions related to or relying upon the Public Health Service Act, the term 'State' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands. For those provisions related to or relying upon the Social Security Act, such as Medicaid or the Children's Health Insurance Program, the term 'State' follows the definition of, State, found at 42 U.S.C. 1301.'' The Department did not receive comments on this definition.

Summary of Regulatory Changes: For the reasons described in the proposed rule [87] and above, the Department adopts the definition of ''State'' with one change, omitting ''follows'' and replacing it with ''shall be defined in accordance with.''

Sub-recipient. The Department proposed that sub-recipient means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, and any person or any public or private agency, institution, organization, or other entity in any State including any successor, assign, or transferee thereof, to whom Federal financial assistance is extended through a recipient or another sub-recipient, or who otherwise receives Federal funds from the Department or a component of the Department indirectly through a recipient or another sub-recipient, but such term does not include any ultimate beneficiary. The term may include foreign or international organizations (such as agencies of the United Nations). The Department received comments on this definition.

Comment: The Department received a comment stating that the proposed definition of ''sub-recipient'' is overly broad and could be read to include every contracting party with a recipient of Federal financial assistance. The commenter proposes that ''sub-recipient'' should be limited ''to those for whom there is a direct pass-through of Federal financial assistance and who are identified as sub-recipients of such dollars in contracts with the direct recipient.''

Response: The Department agrees that the definition should be clarified so that it does not include every entity that contracts with a recipient of Federal financial assistance. The Department, therefore, finalizes this definition with a change to the definition of ''sub-recipient'' replacing the phrase ''to whom Federal financial assistance is extended through a recipient or another sub-recipient,'' with ''to whom there is a pass-through of Federal financial assistance through a recipient or another sub-recipient.'' The Department disagrees, however, that a sub-recipient must be explicitly declared as a sub-recipient in a contract (or a grant). Requiring explicit designation as a sub-recipient could permit sub-recipients in fact to avoid such designation by contracting around such designation.

As discussed concerning the term ''entity,'' the Department is finalizing the terms ''entity,'' ''recipient,'' and ''sub-recipient'' with parallel language to clarify that they all may encompass ''a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).''

Summary of Regulatory Changes: For the reasons described in the proposed rule [88] and above, and considering the comments received, the Department finalizes the definition of ''sub-recipient'' changing ''and'' to ''or,'' replacing the phrase ''to whom Federal financial assistance is extended through a recipient or another sub-recipient, or who otherwise receives Federal funds from the Department or a component of the Department indirectly through a recipient or another sub-recipient'' with ''to whom there is a pass-through of Federal financial assistance or Federal funds from the Department through a recipient or another sub-recipient,'' and to change the last sentence previously referring to ''foreign or international organizations'' to read, ''The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).''

Workforce. The Department proposed that workforce means employees, volunteers, trainees, contractors, and other persons whose conduct, in the performance of work for an entity or health care entity, is under the direct control of such entity or health care entity, whether or not they are paid by the entity or health care entity, as well as health care providers holding privileges with the entity or health care entity. The Department received comments on this definition.

Comment: The Department received comments stating that the inclusion of volunteers, trainees, and contractors within the definition of ''workforce'' is too broad.

Response: The Department does not agree. Under the revised rule text adopted in this final rule, the defined term ''workforce'' is used in a limited number of places and for limited purposes related to voluntary notice provisions in this rule. Limiting ''workforce'' to employees fails to acknowledge the complexity of the health care system. The Department adapted the proposed definition from the definition of ''workforce'' in the regulations implementing the HIPAA administrative simplification provisions, including the HIPAA Privacy Rule. *See* 45 CFR 160.103 (definition of ''workforce''). That definition has worked well to ensure, among other things, the protection of the privacy and security of protected health information. Just as is the case with the HIPAA Rules, compliance with Federal conscience and anti-discrimination laws would not be appropriately comprehensive if only the employees of covered entities were protected, or if institutional entities chose to avoid providing notice to contractors, volunteers, and trainees.

Comment: The Department received a comment suggesting that volunteers and contractors be included in the definition of ''workforce'' only if they are performing or assisting in the performance of health care activities.

Response: The Department disagrees. As stated above, the defined term ''workforce'' is used in only a limited number of places and for limited purposes under the rule. Generally, the statutes enforced under these rules apply to health care activities and entities, but where they do not, the terms of the statute govern.

Summary of Regulatory Changes: For the reasons described in the proposed rule [89] and above, and considering the comments received, the Department

[87] 83 FR 3880, 3895.

[88] 83 FR 3880, 3895 (stating the reasons for the proposed definition of ''sub-recipient,'' except for the modifications adopted herein).

[89] 83 FR 3880, 3895.

adopts the definition of ''workforce'' as proposed.

Applicable Requirements and Prohibitions (§ 88.3)

The Department proposed a statute-by-statute recapitulation of the substantive provisions of each statute that is the subject of this rule, and of the applicability and scope of requirements and prohibitions of each such statute. The proposed ''Applicability'' provisions outlined the specific requirements of the Federal conscience and anti-discrimination laws that apply to various persons and entities. These provisions were taken from the relevant statutory language and would direct covered entities to the appropriate sections that contain the relevant requirements that form the basis of this regulation.

The ''Requirements and Prohibitions'' provisions explained the obligations that the Federal conscience and anti-discrimination laws impose on the Department and on entities that receive applicable Federal financial assistance and other Federal funding from the Department. These provisions were taken from the relevant statutory language. The Department received comments on this section. The responses to comments are provided below following the proposed applicability and requirements and prohibitions provisions for each Federal conscience and anti-discrimination law.

One conforming revision to the proposed rule that the Department has made throughout the ''Requirements and Prohibitions'' provisions is to remove § 88.5 of 45 CFR part 88 (provision of notice) from the list of sections with which applicable persons and entities must comply. As described in the section-by-section analysis for § 88.5 of this rule, the provision of a notice of rights of Federal conscience and anti-discrimination laws is no longer a requirement for the Department and recipients.

Another conforming revision to the proposed rule that the Department has made throughout the ''Requirements and Prohibitions'' provisions is to modify the phrase ''entities to whom'' various paragraphs apply '' to ''entities to which.'' The Department believes the word ''which'' avoids confusion regarding the nature and scope of entities to whom the rule applies.

88.3(a). The Church Amendments. The Department received comments generally supportive of the Church Amendments and supportive of the inclusion of the Church Amendments in the rule, as well as comments opposed to the Church Amendments themselves or to the Department's enforcement of them.

Comment: The Department received comments stating that the proposed rule only protects health care providers who hold moral or religious convictions against the provision of abortion or sterilization, but provides no protection for health care providers whose moral or religious convictions motivate them to provide abortions or sterilizations.

Response: To the extent the commenters' concerns reflect an accurate reading of the Church Amendments, these concerns raised by the commenters are a result of choices Congress itself made. This final rule reasonably interprets the protections that Congress established, but it can neither eliminate nor transform the policy judgments embedded in the text of the Church Amendments or of any other applicable law. To the extent the Church Amendments apply because someone performed or assisted in the performance of a lawful sterilization procedure or abortion, this rule would enforce those provisions to the extent consistent with other statutory and constitutional requirements. *See, e.g.,* § 88.3(a)(2)(iv), (v), and (vii).

Comment: The Department received comments stating that proposed § 88.3(a)(2)(v) and (vi), which apply 42 U.S.C. 300a–7(c)(2) and (d), are too broad, and that 42 U.S.C. 300a–7(d) should be or has been interpreted to provide protections only for participation in abortion or sterilization procedures.

Response: The Department disagrees that these paragraphs should be limited to situations involving abortion and sterilization. Paragraphs (b), (c)(1), and (e) of the Church Amendments clearly specify they apply concerning abortions or sterilizations. But paragraphs (c)(2) and (d) do not use that language; instead, as Congress specified, they encompass ''any lawful health service or research activity'' or ''any part of a health service program or research activity,'' respectively. The Department is required to implement the statutes as written by Congress. Reading paragraphs (c)(2) and (d) to address only abortion and sterilization procedures would narrow the scope of those statutory provisions in contravention of the clear text of the statute. Furthermore, court opinions interpreting 42 U.S.C. 300a–7(d) have varied in their interpretations, but recognize that it applies to more than abortion or sterilization procedures.[90]

Regarding the breadth and accuracy of § 88.3 overall, however, the Department finalizes the paragraph with changes to more accurately reflect the statutory text. With respect to § 88.3(a)(2)(v), however, the Department agrees that the proposed rule was imprecise in omitting one limiting phrase that Congress had included in paragraph (c)(2) of the Church Amendments. The proposed rule ended § 88.3(a)(2)(v) with, ''because of his or her religious beliefs or moral convictions,'' while the statute reads, ''because of his religious beliefs or moral convictions respecting any such service or activity.'' The Department finalizes this paragraph to add the phrase ''respecting any such service or activity'' that Congress included in this part of the statute.

Comment: The Department received a comment stating that the rule should clarify that the protections provided by Congress under 42 U.S.C. 300a–7(b) and (c) apply only to abortions and sterilizations in the circumstances provided for in the statute.

Response: Paragraphs (b) and (c)(1) of the Church Amendments specify that they apply in the context of abortion and sterilization procedures specifically. Paragraph (c)(2) has a broader reach, encompassing ''any lawful health service or research activity.'' As discussed in response to the similar comment asking that (c)(2) and (d) be interpreted to encompass only abortion and sterilizations, Congress limited paragraphs (b), (c)(1), and (e) to abortions and sterilizations, but used different language in paragraphs (c)(2) and (d). The rule tracks the text of paragraphs (b) and (c)(1) accordingly, as established by Congress. Paragraphs (a)(2)(i) through (iv) and (vii) in § 88.3 of the rule explicitly relate to abortions or sterilizations,[91] while § 88.3(a)(2)(v) through (vi) relate to any lawful health service or research activity.[92]

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[90] *See, e.g., Vt. Alliance for Ethical Healthcare, Inc.* v. *Hoser,* 274 F. Supp. 3d 227, 232 (D. Vt. 2017) (''Section 300a–7(d) is one of several so-called Church Amendments. It excuses individuals engaged in health care or research from any obligation to perform abortions *or other procedures* which may violate religious beliefs or moral convictions.'' (emphasis added)); *Franciscan Alliance, Inc.* v. *Burwell,* 227 F. Supp. 3d 660, 683 (Dec. 31, 2016) (''The Church Amendment forbids requiring any individual 'to perform or assist in the performance of any part of a health service program . . . if his performance or assistance in the performance of such part of such program . . . would be contrary to his religious beliefs or moral convictions.' '' (alterations)).

[91] Paragraph 88.3(a)(2)(i) implements subparagraph (b)(1) of the Church Amendments; paragraphs 88.3(a)(2)(ii) and (iii) implement paragraph (b)(2) of the Church Amendments; and paragraph 88.3(a)(2)(iv) implements paragraph (c)(1) of the Church Amendments.

[92] Paragraph 88.3(a)(2)(v) implements subparagraph (c)(2) of the Church Amendment.

Comment: The Department received comments asking for clarification whether the provisions in § 88.3(a) that relate to sterilization include only intentional sterilizations, or whether they also include procedures or services that have sterilization as a side effect, such as hysterectomies performed for reasons other than sterilization, or chemotherapy.

Response: Congress did not provide a definition of sterilization in the Church Amendments, or further specify the scope of objections under those statutes, but provided broad protections for religious and moral objections to sterilization procedures. Generally speaking, the Department understands the term ''sterilization'' as used in the Church Amendments to encompass the ordinary meaning of that term, and does not understand the term to include treatment of a physical disease where sterilization is an unintended side effect of the treatment, such as chemotherapy to treat uterine cancer or testicular cancer. To the extent that a Church Amendment complaint with respect to sterilization is filed, the Department would examine the facts and circumstances of each such claim to determine whether an act falls within the scope of the statute and these regulations.

Comment: The Department received comments asking for clarification about whether provisions in § 88.3(a) apply to sterilizations performed in the context of gender dysphoria.

Response: The Department is aware of three cases brought at least in part under the Church Amendments, in which the claimants argued that the Church Amendments' sterilization provisions protect the claimants' conscientious objections to performing gender dysphoria related surgery. In one case, *Franciscan Alliance, Inc.* v. *Burwell,* 227 F. Supp. 3d 660 (Dec. 31, 2016), enforcement of the challenged regulation, which plaintiffs contended would have required the performance of procedures such as hysterectomies to treat gender dysphoria, was preliminarily enjoined on other grounds. In the other two, consolidated as *Religious Sisters of Mercy, et al.,* v. *Burwell,* No. 3:16–cv–386 (D.N.D. 2017), which challenged the same regulation, the court issued an order staying enforcement of the regulation in light of the nationwide preliminary injunction issued in *Franciscan Alliance.* In the event the Department receives any such complaints, the Department will consider them on a case-by-case basis.

Comment: The Department received comments contending that the paragraphs of the rule concerning the Church Amendments were too broad or did not faithfully apply the statutory text.

Response: The Department intended § 88.3 to faithfully apply the text of applicable statutes, including the Church Amendments. As a result of comments, the Department became aware of instances in which the proposed rule text did not accurately reflect the content of the statute. Accordingly, the Department finalizes the rule with changes to more accurately reflect the statute. Specifically, in § 88.3(a)(2)(ii) and (iii), concerning paragraphs (b)(2)(A) and (B) of the Church Amendments, the Department finalizes the rule by changing the phrase ''entities to whom this paragraph . . . applies shall not require any entity funded under the Public Health Service Act'' to ''the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any entity does not authorize entities to which this paragraph . . . applies to require such entity to . . . .''

The Department also finalizes § 88.3(a)(1)(vi) by changing ''Any entity that carries out'' to ''Any entity that receives funds for any health service program or research activity under any program administered by the Secretary of Health and Human Services.'' The Department makes this change to provide clarity regarding which entities are required to comply with paragraph (d) of the Church Amendments.

Comment: The Department received a comment stating that the rule should clarify that the protections provided by Congress under 42 U.S.C. 300a–7(d) apply only to individuals.

Response: The rule tracks the statutory language. Namely, § 88.3(a)(2)(vi) states that covered entities ''shall not require any *individual* . . . '' (emphasis added) to act contrary to their religious beliefs or moral convictions in the performance of certain health service programs or research activities. The Department maintains such language in this final rule.

Summary of Regulatory Changes: For the reasons described in the proposed rule [93] and above, and considering the comments received, the Department makes certain changes in this paragraph in this final rule. The Department finalizes § 88.3(a)(1)(vi) by changing ''Any entity that carries out'' to ''Any entity that receives funds for any health service program or research activity under any program administered by the Secretary of Health and Human Services.'' The Department finalizes § 88.3(a)(2)(ii) and (iii) by changing the word ''entity'' to ''recipient'' where applicable, in order to avoid confusion potentially created by the use of the word ''entity'' to refer both to protected entities and entities obligated to comply with 88.3(a). Additionally, in § 88.3(a)(2)(i) through (vii), concerning paragraphs and paragraphs of the Church Amendments, the Department finalizes paragraphs (a)(2)(i) through (vii) by changing the language of each paragraph to adopt the statutory text as closely as possible in relevant part, including by adding the words ''respecting any such service or activity'' to the end of § 88.3(a)(2)(v); amending § 88.3(a)(2)(i) to clarify that the statute enforces a rule of construction regarding the receipt of certain Federal financial assistance; by rephrasing the requirements to state that the receipt of relevant funds ''does not authorize entities to which this paragraph [ ] applies to require'' practices specified by 42 U.S.C. 300a–7(b); adding in the parenthetical from the statute, ''(including applicants for internships and residencies)'', to § 88.3(a)(2)(vii); and replacing short form descriptions of the statutory text with the full statutory text, such as by changing the words ''doing so'' in § 88.3(a)(2)(v) to ''his performance or assistance in the performance of such service or activity.'' The Department also eliminates some articles and terms, like ''the'' and ''or her,'' and replaces the term ''whom'' with the term ''which'' for readability and accuracy.

88.3(b). Coats-Snowe Amendment. The Department received comments generally supportive of the Coats-Snowe Amendment and supportive of the inclusion of the Coats-Snowe Amendment in the rule, as well as comments opposed to the Coats-Snowe Amendment or the rule's implementation of that statute.

Comment: The Department received comments on the definition of terms used by the Coats-Snowe Amendment, such as what constitutes a ''health care entity.'' All such comments are addressed in the responses to comments on definitions under § 88.2.

Comment: The Department received a comment stating that the Coats-Snowe Amendment was only a ''narrow response to a specific problem''—correcting a loophole that could have conditioned Federal financial assistance on the provision of abortions indirectly through the Accrediting Council on Graduate Medical Education's accreditation standards for obstetrics and gynecology graduate programs—not

[93] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(a), except for the modifications adopted herein).

a pronouncement of new national policy and ''cannot justify the rulemaking authority the Department claims in the NPRM.''

Response: The Department disagrees. While the Coats-Snowe Amendment may have been motivated by the situation involving the Accrediting Council on Graduate Medical Education's accreditation standards for obstetrics and gynecology graduate medical education programs and standards for the receipt of Federal financial assistance based on accreditation, the plain language of the text of the Coats-Snowe Amendment is broader than that situation. While paragraph (b) of the Coats-Snowe Amendment addresses the accreditation and treatment of postgraduate physician training programs (and physicians trained in such programs) that are or are not accredited by accrediting agencies that require the performance and training in the performance of induced abortions, paragraph (a) of the Coats-Snowe Amendment establishes far broader protections for health care entities that refuse, among other things, to provide or undergo training in the performance of induced abortions, to perform such abortions, or to provide referrals for such training or such abortions. The Amendment was, thus, drafted with separate language to provide both general protections, relating to the training, performance of, and referral for abortions, and specific protections, relating to governmental treatment of physicians and physician training programs where the accreditation agency had accreditation standards that requires performance or training in the performance of induced abortion.

This rule must be governed by the text of the law, not legislative intent or legislative history that may or may not have been reflected in the text passed by Congress and signed by the President. The Department finds it appropriate for this rule to follow the text of the Coats-Snowe Amendment, and not to narrow its scope based on what may have been the impetus for the introduction, passage or enactment of the statute. The Department intends to provide enforcement mechanisms for the protections that Congress actually enacted.

Comment: The Department received comments stating that the Coats-Snowe Amendment only provides protections for entities that object to abortions for religious or moral reasons.

Response: The Department disagrees. As the text of the Church Amendments makes clear, when Congress wants to limit a protection to situations in which the protected party acts or refuses to act on the basis of religious beliefs or moral convictions specifically (as distinct from other reasons), it explicitly includes such a limitation. The text of the Coats-Snowe Amendment, unlike the text of the Church Amendments, does not include any such limitation. It encompasses objections concerning such activities as training, performing, providing referrals for, or making arrangements for referrals for abortions or abortion training, without specifying that the objections are only protected if they are based on religious beliefs or moral convictions. Limiting the application of the Coats-Snowe Amendment to only situations in which the protected entity is acting on the basis of religious beliefs or moral convictions would be to add narrowing language to the Coats-Snowe Amendment that Congress did not include.

Comment: The Department received a comment stating that parts of proposed § 88.3 could affect the ability of independent institutions to set standards for accreditation or licensure.

Response: The Department agrees in part. As other commenters have noted, one purpose leading to enactment of the Coats-Snowe Amendment was to prevent States from basing their accreditation or licensure decisions on grounds that eliminate medical schools or their graduates from the medical profession on the basis that they refuse to be involved in abortion. The Coats-Snowe Amendment prevents States that receive Federal financial assistance from engaging in discrimination that would, for example, refuse accreditation to medical schools, or licensure to physicians or nurses, because they did not provide training for, train on, or perform, abortions. The Amendment does not directly regulate any non-governmental entity. The amendment, however, would preclude a State from relying on a private entity's refusal to accredit on the bases just described in order to, among other things, deny recognition to the medical school as a medical school, or to deny recognition of the medical degree of a graduate of that school.

The Department finalizes § 88.3 with other changes from the proposed rule to include language from the statute as follows. Specifically, the proposed rule did not reflect, as set forth in paragraph (b)(1) of the statute, that ''the government involved,'' meaning Federal, State, or local, ''shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.'' In response to comments, the Department has included language at the end of § 88.3(b)(2)(ii) reflecting this relevant statutory text.

Summary of Regulatory Changes: For the reasons described in the proposed rule [94] and above, and considering the comments received, the Department finalizes § 88.3(b) with the following changes.

Further consideration led the Department to determine that the proposed text of § 88.3(b)(1)(i) presented concerns regarding the scope of entities to which the proposed § 88.3(b) would apply. Accordingly, the Department is finalizing § 88.3(b)(1)(i) to read ''The Department is required to comply with'' in lieu of the proposed rule's statement that ''The Federal government, including the Department, is required to comply with.''

The Department removes references to ''individual or institutional'' in § 88.3(b)(2)(i), in order to avoid confusion regarding the definition of the term ''health care entity.'' While the Department makes this change, it is not intended to change the scope of protection provided by the Coats-Snowe Amendment (and this final rule)—namely, both individuals and organizations (or institutions) that constitute health care entities. The Department also removes a reference to ''require attendees to'' in (b)(2)(i)(C) in order to more accurately track the language of the statute. The Department finalizes § 88.3(b)(2)(ii) by changing ''an accreditation standard or standards'' to ''accreditation standards'' and changing ''such standard provides'' to ''such standards provide;'' and adding ''that require an entity to'' in order to more clearly articulate the requirements of the statute. Finally, in order to fully incorporate the text of the Coats-Snowe Amendment, the Department also adds the sentence ''Entities to which this paragraph (b)(2)(ii) applies and which are involved in such matters shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this paragraph.''

Additionally, the Department removes the Federal government from the applicability section in § 88.3(b)(1)(i) but leaves ''the Department.'' Although the relevant statutory provision applies to the Federal government, this rule concerns the activities and programs funded or administered by the

[94] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(b), except for the modifications adopted herein).

Department rather than the entire Federal Government.

88.3(c). Weldon Amendment. The Department received comments on this paragraph, including comments generally supportive of the Weldon Amendment and supportive of the inclusion of the Weldon Amendment in the proposed rule, as well as comments opposed to the Weldon Amendment itself or the proposed rule's implementation of the Amendment.

Comment: The Department received comments on the definition of terms used by the Weldon Amendment, such as what constitutes a ''health care entity.'' All such comments are addressed above in the responses to comments on definitions under § 88.2.

Comment: The Department received comments stating that the Weldon Amendment does not provide authority for the Department to impose any burdens or obligations on health care entities, such as the requirement of an assurance of compliance and the notice requirement.

Response: Assurance requirements to remedy past discrimination or prevent future discrimination are common regulatory features of anti-discrimination laws like those that are the subject of this rule and such authority has been affirmed by the Supreme Court. *See Grove City College* v. *Bell,* 465 U.S. 555 (1984) (affirming partial termination of institution's Federal funds for refusing to sign a Title IX assurance of compliance form). In response to comments, the Department has revised the proposed notice provisions from being a requirement to being one factor that OCR considers in its determinations as to whether a covered entity is in violation of this part. Comments concerning assurance and notice provisions are discussed in more detail below in §§ 88.4 and 88.5, proposing to impose those provisions.

Comment: The Department received comments stating that the proposed rule impermissibly extends the Weldon Amendment to apply to non-governmental entities, and that the proposed rule disagrees with the position taken by the government in *National Family Planning and Reproductive Health Association* v. *Gonzales,* 391 F. Supp. 2d 200 (D.D.C. 2005), regarding whether the Weldon Amendment extends to non-governmental entities through those entities' receipt of Federal financial assistance.

Response: The Department agrees that, as proposed, § 88.3 was worded to extend the Weldon Amendment to non-governmental entities in ways not encompassed by the text of the Amendment as written. This was due to the inclusion of paragraph (c)(1)(iii) in that section, which required compliance with the Weldon Amendment by ''any entity'' that receives funds to which the Weldon Amendment applies. This paragraph would render superfluous paragraphs (c)(1)(i) and (ii), which require compliance with the Weldon Amendment by the Department and its programs and by any State or local government that receives funds to which the Weldon Amendment applies. The Department is therefore finalizing § 88.3(c)(1) by removing paragraph (c)(1)(iii).

The Department notes, however, that the conduct and activities of contractors engaged by the Department, a Departmental program, or a State or local government is attributable to such Department, program, or government for purposes of enforcement or liability under the Weldon amendment.

Comment: The Department received comments stating that the Department cannot engage in permanent rulemaking based on an annual appropriations amendment that may or may not be reenacted with each appropriations act.

Response: The Department disagrees. The Department has outlined, above, the authority that it relies upon to promulgate regulations containing the substantive requirements established in the Weldon Amendment. The Department further notes that it has promulgated rules based on the Weldon Amendment in 2008 and 2011 and has operated under such rules based in part on the annual appropriations amendment cited. The Department has similarly issued regulations to implement annual appropriations amendments, such as the Hyde Amendment.[95] Paragraphs (c)(1)(i) and (ii) in § 88.3 of this rule specify that compliance is only effective ''under an appropriations act . . . that contains the Weldon Amendment.'' Therefore, the provisions of this rule enforcing the Weldon Amendment will only be applicable to a State or local government that receives funds subject to such appropriation. If Congress were to substantially change or not renew the Weldon Amendment, the final rule would not apply to that extent.

Comment: The Department received comments stating that the Weldon Amendment cannot be interpreted to prevent States from requiring abortion coverage, because the Affordable Care Act, at 42 U.S.C. 18023(c)(1), states, ''Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage, funding, or procedural requirements on abortions.''

Response: The Weldon Amendment is not part of the Affordable Care Act. Therefore, 42 U.S.C. 18023(c)(1), which states, ''[n]othing in this Act'' shall be construed to have an effect on State laws requiring abortion coverage, does not apply to the Weldon Amendment. More importantly, ACA section 1303 also provides that ''[n]othing in this Act shall be construed to have any effect on Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.'' 42 U.S.C. 18023(c)(2). In addition, the Weldon Amendment has been renewed more recently than Congress enacted the Affordable Care Act, and therefore is generally owed deference if the two laws did conflict, which they do not.

Comment: The Department received comments stating that the Weldon Amendment, as evidenced by its legislative history, does not apply to refusals unrelated to conscience-based (that is, religious or moral) objections, such as purely financial or operational motives.

Response: The Department disagrees, for similar reasons described above in response to comments arguing for a narrow interpretation of the Coats-Snowe Amendment. As the text of the Church Amendments makes clear, when Congress wants to limit a protection to situations in which the protected party acts or refuses to act on the basis of religious beliefs or moral convictions, it explicitly includes such limitation in the text of the statute. The text of the Weldon Amendment, unlike the text of the Church Amendments, does not include any such limitation. On its face, the Weldon Amendment encompasses a decision by a health care entity not to provide, pay for, provide coverage of, or refer for abortions, without specifying that such decisions must be based on religious, moral, conscientious, or any other particular motive. Limiting the application of the Weldon Amendment only to situations in which the health care entity is acting on the basis of conscientious, moral or religious convictions would be to refuse to apply the Weldon Amendment according to the text enacted by Congress.

Comment: The Department received comments asking for clarification that

[95] *See, e.g.,* 42 CFR 441.202, 441.203, 441.206 (prohibiting the use of Federal funds under Medicaid to pay for abortions except when continuation of the pregnancy would endanger the mother's life).

the Weldon Amendment only applies with respect to abortions.

Response: The Department agrees with the commenter. The text of the proposed rule already makes clear that, as stated in the text of the Weldon Amendment and as described in this rule, the Weldon Amendment only protects against discrimination on the basis that a health care entity does not provide, pay for, provide coverage of, or refer for abortions.

Comment: The Department received a comment stating that the proposed rule would impermissibly extend the Weldon Amendment's protection beyond the abortion context to protect refusals to provide, pay for, provide coverage of, or refer for ''any lawful health service.''

Response: The Department disagrees. Nothing in the proposed rule or in this final rule extends protections under the Weldon Amendment outside of the abortion context. As § 88.3(c)(2) states, ''The entities to whom this paragraph (c)(2) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, *abortion*'' (emphasis added). The regulatory provision in the proposed rule and in this final rule that makes reference to ''any lawful health service'' addresses and would implement paragraph (c)(2) of the Church Amendments, which prohibits certain discrimination against a physician or other health care personnel because, among other things, ''he performed or assisted in the performance of any lawful health service or research activity.'' [96]

Summary of Regulatory Changes: For the reasons described in the proposed rule [97] and above, and considering the comments received, the Department finalizes § 88.3(c) as proposed, except for changes to the citation to the most current Public Law where the Weldon Amendment may be found, and the removal of proposed paragraph (c)(1)(iii). Additionally, the Department is adding the phrase ''and its programs'' after ''the Department'' to track the statutory language more closely.

88.3(d). Medicare Advantage, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B, sec. 209. The Department did not receive comments on this paragraph. The Department has updated the title of this paragraph for the most recent appropriations rider for the current fiscal year. For clarity and accuracy, in paragraph (d)(1), the Department changed ''under the Medicare Advantage program'' to read ''with respect to the Medicare Advantage program,'' and updated the citation therein.

Summary of Regulatory Changes: For the reasons described in the proposed rule [98] and above, the Department finalizes § 88.3(d) primarily as proposed, but updates the header and citations in paragraph (d)(1) to reflect the citation for this appropriations ride for FY 2019, and replaced ''under,'' and adds ''informs the Secretary that it'' for clarity in paragraph (d)(2).

88.3(e). Section 1553 of the Affordable Care Act, 42 U.S.C. 18113. The Department received comments on this paragraph, including comments generally supportive of section 1553 of the Affordable Care Act and supportive of the inclusion of section 1553 in the rule, as well as comments opposing that section and the Department's enforcement of it.

Comment: The Department received comments stating that section 1553 cannot allow a health care professional to omit information about ''all choices'' available at end-of-life because a patient has a right to be informed.

Response: The Department disagrees with this comment. Congress specified in section 1553 that a health care entity is protected in its decision not to provide ''any health care item or service furnished for the purposes of causing, or for the purpose of assisting in causing'' assisted suicide, euthanasia, or mercy killing. The Department is unaware of any Federal requirement that an individual or health care entity provide information about a service that it does not provide. Medical ethics have long protected rights of conscience alongside the principles of informed consent. The Department does not believe that enforcement of conscience protections, many of which date to the era of *Roe* v. *Wade* and *Doe* v. *Bolton,* violates or undermines the principles of informed consent. In fact, in *Roe* the Supreme Court favorably cited an American Medical Association resolution on abortion affirming ''[t]hat no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.'' [99] Similarly, in *Doe* the Court spoke favorably about Georgia's statutory language giving a hospital the freedom not to admit a patient for an abortion, and protecting a physician or other hospital employee ''for moral or religious reasons'' from participating in an abortion procedure.[100] The Department interprets section 1553 as specifically encompassing the decision by a health care entity not to provide information about, or referrals for, assisted suicide.[101]

Comment: The Department received a comment stating that, while Congress explicitly granted the Department the authority to promulgate regulations to implement section 1557 of the ACA, Congress did not provide such a grant for section 1553, but only gave the Department the authority to ''receive complaints of discrimination'' under section 1553.

Response: As discussed *supra* at part III.A, multiple statutes and regulations authorize the Department to issue these rules—including with respect to ACA section 1553—to ensure that the Department and covered entities comply with Federal conscience and anti-discrimination laws that apply to certain Federal funding. With respect to section 1553 specifically, that section imposes specific provisions, including construction provisions, and mandates that the Department's Office for Civil Rights implement section 1553 by receiving complaints. This rule follows that language and provides Departmental mechanisms for acting upon complaints under section 1553. Such authority is implicit in the authority to receive complaints set forth in 1553. If that were not the case, OCR would not be able to comply with Congress's direction under section 1553 to handle and respond to complaints it receives, making the authority designated to OCR in section 1553 mere surplusage, hollow, or inoperative.[102]

The fact that section 1557 of the Affordable Care Act specifically authorized, but did not require, the Department to issue regulations to

[96] *See* 42 U.S.C. 300a–7(c)(2); *compare* 45 CFR 88.3(a)(2)(v) (implementing Church (c)(2) *with* 45 CFR 88.3(c) (implementing Weldon Amendment).

[97] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(c), except for the modifications adopted herein).

[98] 83 FR 3880, 3895.

[99] 410 U.S. at 143–44.

[100] 410 U.S. at 197–98.

[101] A referral is a health care service, and the phrase ''assisting in causing'' is reasonably interpreted to carry the same meaning as ''assisting in performing,'' which the Department interprets to include the act of referring.

[102] *See Hibbs* v. *Winn,* 542 U.S. 88, 101 (2004) (statutes should be construed so as to avoid rendering superfluous any statutory language; ''statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .'').

implement that section, does not negate the authority Congress provided the Secretary under 5 U.S.C. 301 and the other statutory and regulatory authorities cited *supra* at part III.A to carry out the duties Congress designated to OCR under section 1553 of the ACA. In particular, as discussed above, section 1321(a) of the ACA authorizes the Department to ''issue regulations setting standards for meeting the requirements under [title I of the ACA] with respect to . . . the offering of qualified health plans through such Exchanges . . . and . . . such other requirements as the Secretary determines appropriate.'' Section 1321(a), thus, provides the Department with the authority to issue regulations setting setting standard for meeting the requirements established in section 1553, which is part of title 1 of the ACA.

Summary of Regulatory Changes: For the reasons described in the proposed rule [103] and above, and considering the comments received, the Department finalizes § 88.3(e) as proposed with minor technical changes for clarity and adherence to the text of section 1553 of the ACA, for example changing ''any amendment'' to ''an amendment'' and clarifying that ''the Act'' refers to the ''Patient Protection and Affordable Care Act.'' Paragraph (e)(1)(iv) clarifies that the amendment would have been ''made by the Patient Protection and Affordable Care Act,'' and paragraph (e)(2) deletes ''provided, that.''

88.3(f). Section 1303 of the Affordable Care Act, 42 U.S.C. 18023. The Department received comments on this paragraph, including comments generally supportive of section 1303 of the Affordable Care Act and supportive of the inclusion of section 1303 in the rule, as well as comments critical of this proposed paragraph.

Comment: The Department received a comment stating that the inclusion of section 1303 of the ACA in this rule is redundant, as the conscience protections provided for in section 1303 are also provided by other conscience protection statutes, and by the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*

Response: The Department disagrees. Section 1303 contains several distinct provisions relating to conscience and conscience protections, in section 1303. While section 1303(c)(2) references and preserves the applicability of Federal laws regarding conscience protection,[104] section 1303(b)(1) and (b)(4) provide standalone conscience protections that are independent of other Federal conscience protection provisions. While the language used in section 1303(b)(1) and (b)(4) is similar to other conscience protection statutes, these provisions provide independent conscience protections both with respect to governmental requirements of qualified health plans, and with respect to qualified health plans' discrimination against individual health care providers and health care facilities. Additionally, were other Federal conscience and anti-discrimination laws to be revoked, the conscience protections in section 1303(b)(1) and (b)(4) of the ACA could remain in effect. The Department does not presume that separate Federal conscience and anti-discrimination laws enacted by Congress are redundant. It is a principle of statutory construction that effect should be given to overlapping statutes as long as there is no ''positive repugnance'' between them. *See, e.g., Connecticut Nat'l Bank* v. *Germain,* 503 U.S. 249, 253 (1992). And there is no such positive repugnance here.

Summary of Regulatory Changes: For the reasons described in the proposed rule [105] and above, and considering the comments received, the Department finalizes § 88.3(f) as proposed, with a technical correction to reflect that 42 U.S.C. 18023(b)(1)(A) is a rule of construction regarding Title I of the Patient Protection and Affordable Care Act, rather than a substantive prohibition. In paragraph (f)(2)(i), the Department clarifies that the entities shall not ''construe anything in Title I of the Patient Protection and Affordable Care Act (or any amendment made by Title I of the Patient Protection and Affordable Care Act) to.''

88.3(g). Section 1411 of the Affordable Care Act, 42 U.S.C. 18081. The Department did not receive comments on this paragraph.

The Department intended § 88.3 to faithfully apply the text of applicable statutes, including section 1411 of the Affordable Care Act, while at the same time, providing clarity to regulated persons and entities. To this end, the final rule clarifies in § 88.3(g)(2) that the Department is required not only to provide a certification documenting a religious exemption from the individual responsibility requirement and penalty under the Affordable Care Act, which appeared in the proposed rule, but also to coordinate with State Health Benefit Exchanges (State Exchanges) in the implementing of the certification requirements of 42 U.S.C. 18031(d)(4)(H)(ii) where applicable. The Department works closely with State Exchanges to implement the Affordable Care Act, and for clarity, the final rule reflects that coordination. For similar reasons, the Department modified § 88.3(g)(2)(i) to reflect changes Congress made to 26 U.S.C. 5000A through section 4003 of the SUPPORT for Patients and Communities Act, which became law October 24, 2018.[106] Those changes retained a reference in 26 U.S.C. 5000A to 26 U.S.C. 1402(g)(1), which sets out various conditions for eligibility for the conscience exemption from the individual responsibility requirement. Among those conditions is a requirement that the religious sect or division thereof to which the applicant for the exemption belongs must have been in existence at all times since December 31, 1950. The Department has omitted this particular requirement from § 88.3(g)(2)(i) out of concern that it may conflict with the Establishment Clause.

The Department understands that Public Law 115–97 (December 22, 2017) reduced the penalty in 26 U.S.C. 5000A for a lack of minimum essential coverage to zero dollars,[107] and that the implications of this law is the subject of substantial litigation. The Department, nevertheless, believes it is prudent to implement the certification requirements as proposed because we understand the law still requires individuals to submit proof of essential coverage or be certified as exempt despite the penalty being zeroed out.

Summary of Regulatory Changes: For the reasons described in the proposed rule [108] and above, the Department finalizes § 88.3(g) as proposed, with technical corrections to reflect that the individuals to whom the Department grants certifications under 42 U.S.C. 18081 are individuals who have applied for such certifications and to ensure the language follows that of the statute, a typographical correction to change the reference to ''5000A(2)(B)(ii)'' to ''5000A(d)(2)(B)(i),'' modifications to comport with Congress's revisions to 42 U.S.C. 5000A(d) through the October 24, 2018, enactment of the SUPPORT for Patients and Communities Act, which broadens the application of the exemption and discusses exclusions regarding what constitutes medical

[103] 83 FR 3880, 3895.

[104] 42 U.S.C. 18023(c)(2) (''[n]othing in this Act shall be construed to have any effect on Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion'').

[105] 83 FR 3880, 3895.

[106] SUPPORT for Patients and Communities Act, Public Law 115–271, sec. 4003, 26 U.S.C. 5000A(d)(2) (2018).

[107] Budget Fiscal Year, 2018, Public Law 115–97, Part VIII, sec. 11081, 131 Stat. 2092 (Dec. 22, 2017).

[108] 83 FR 3880, 3895.

health services, and the Department adds clarification for the Department to comply with the applicable prohibitions in coordination with State Exchanges.

88.3(h). Counseling and referral provisions of 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B). The Department received comments on this paragraph.

Comment: The Department received a comment stating that, while the statutory text of 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B) established rules of construction, the proposed rule converted these statutes into freestanding exemptions.

Response: The Department agrees that the proposed rule is worded imprecisely to treat 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B) as freestanding exemptions, rather than as rules of construction as set forth in the statutory text. The Department, therefore, modifies the final rule accordingly to conform to the statutory text.

Summary of Regulatory Changes: For the reasons described in the proposed rule [109] and above, and considering the comments received, the Department finalizes § 88.3(h)(2)(i) by referring to regulations that also implement the statutes containing the requirements and prohibitions, for example by adding ''construe 42 U.S.C. 1395w–22(j)(3)(A) or 42 CFR 422.206(a) to,''; by deleting ''offer a plan that provides, reimburses for, or provides'' and replace it with ''provide, reimburse for, or provide,''; inserting ''offering the plan'' to the end of paragraph (h)(2)(i); and adding paragraph (h)(2)(i)(B) regarding making information available to prospective enrollees and enrollees. The Department also made changes to paragraph (h)(2)(ii) by changing the phrase ''shall not require a Medicaid managed care organization to provide'' to ''shall not construe 42 U.S.C. 1396u–2(b)(3)(A) or 42 CFR 438.102(a)(1) to require,''; deleting ''objects to the provision of such service on moral or religious grounds,''; and adding paragraphs (h)(2)(ii)(A) and (B), (A) stating the organization objects on moral or religious grounds and (B) regarding the policies to prospective enrollees and enrollees.

88.3(i). Advance Directives, 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406. The Department received comments on this paragraph.

Comment: The Department received a comment stating that 42 U.S.C. 1395cc(f) requires that certain entities maintain written policies and procedures to inform patients of their ''individual rights under State law to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advanced directives,'' but the proposed rule ''attempt[s] to rewrite this provision by prohibiting this statute from being construed to require covered entities to provide full information to patients about services to which they may object.''

Response: The Department disagrees. This final rule provides for the enforcement of 42 U.S.C. 14406, which states, ''. . . section 1395cc(f) . . . shall not be construed (1) to require any provider or organization, or any employee of such a provider or organization, to inform or counsel any individual regarding any right to obtain an item or service furnished for the purpose of causing, or the purpose of assisting in causing, the death of the individual, such as by assisted suicide, euthanasia, or mercy killing. . . .'' This statutory language is adopted almost verbatim into § 88.3(i)(2)(i). Far from ''attempt[ing] to rewrite this provision,'' this rule merely adopts Congress's rule of construction provision as Congress enacted it.

Comment: The Department received comments stating that advance directives should be followed regardless of a physician's personal objections.

Response: Paragraph (i) in § 88.3 provides for the implementation and enforcement of provisions at 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406, which assure that applicable Federal laws (relating to Medicare and Medicaid) are not used contrary to statute to prohibit health care providers from exercising their rights of conscience with respect to advance directives, including with respect to assisted suicide. This provision does not affect State laws governing the enforceability of advance directives. But, in general, the Department believes that protecting health care providers' rights of conscience with respect to advance directives ensures that doctors, nurses, and other persons in the health care industry are not forced to choose between continuing to serve as health care providers and remaining faithful to their deepest convictions. Such conscience protection ensures diversity in the health care industry and maximizes the number of health care professionals in the United States, which helps all patients.

Summary of Regulatory Changes: For the reasons described in the proposed rule [110] and above, and considering the comments received, the Department finalizes § 88.3(i) with a change to correct a typographical error in § 88.3(i)(2)(i), where ''1395a(w)'' should instead read ''1396a(w)(3).''

88.3(j). Global Health Programs, 22 U.S.C. 7631(d). The Department received comments on this paragraph.

Comment: The Department received comments in opposition to the Department's enforcement of Federal conscience and anti-discrimination laws outside of the United States, because populations served by U.S. foreign aid often have less financial resources and access to fewer medical providers than persons in the United States.

Response: The Department disagrees with the underlying premise of this comment. As described above, the Department believes that enforcing statutory conscience rights will increase, not decrease, the availability of quality medical care because it will prevent the exclusion of health care professionals motivated by deep religious beliefs or moral convictions to serve others, often the most underprivileged. Moreover, this rule merely provides for the enforcement of laws enacted by Congress that, by their own terms, may apply abroad.

Comment: The Department received a comment stating that the provisions with respect to foreign policy may lead to confusion as to which laws properly govern foreign aid.

Response: Upon reviewing the text of this paragraph, the Department has revised the language to make it clearer to which entities the requirements apply, and the circumstances in which they apply, and to more closely track the language enacted by Congress. The proposed rule would have applied the requirements of this paragraph to the Department and recipients of relevant Federal financial assistance. However, 22 U.S.C. 7631(d) does not impose requirements on what recipients of assistance can and cannot do; rather, it imposes requirements on the conditions that may be placed on receipt of assistance. The statute does not provide a description of the entities that the statute governs—*i.e.,* entities that are in a position to place conditions on the receipt of assistance of assistance. The Department believes that class of entities is best described as those that are authorized to obligate the assistance. Accordingly, the Department is modifying § 88.3(j)(1) to apply to the Department and entities that are authorized by statute, regulation, or agreement to obligate Federal financial

[109] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(h), except for the modifications adopted herein).

[110] 83 FR 3880, 3895.

assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2), under Chapter 83 of Title 22 of the U.S. Code or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such Federal financial assistance is administered by the Secretary, and is deleting the reference regarding the Federal financial assistance being ''for HIV/AIDS prevention, treatment, or care to the extent administered by the Secretary.''

Summary of Regulatory Changes: For the reasons described in the proposed rule [111] and above, and considering the comments received, the Department finalizes § 88.3(j) with technical changes clarifying the language regarding to which entities the requirements apply, and the circumstances in which they apply, to more closely follow the language of such statutes and amendments as enacted by Congress, eliminating in paragraph (j)(2)(i) ''To the extent administered by the Secretary'' and inserting ''Require an organization, including a faith-based organization, that is otherwise eligible to receive assistance,'' deleting ''require applicants for'' and replacing it with ''to the extent such assistance is administered by the Secretary, . . . as a condition of such assistance.'' The Department also changed ''applicant'' to ''organization'' and removed ''as a condition of assistance'' in (j)(2)(i)(B), and made significant edits to paragraph (j)(2)(ii) for accuracy regarding the statutory text and references to other paragraphs of this part.

88.3(k). The Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f); e.g., Consolidated Appropriations Act, 2019, Public Law 116–6, Div. F, sec. 7018. The Department received comments on this paragraph.

Comment: The Department received a comment stating that the provisions with respect to foreign policy may lead to confusion as to which laws properly govern foreign aid.

Response: Upon reviewing the text of this paragraph, the Department has revised the language to make it clearer as to which laws and amendments are implicated by this paragraph, and to more closely track the statutory language enacted by Congress. For clarity, the heading of the paragraph has been revised to refer to each of the four separate statutory provisions implemented by the paragraph, rather than only to the Helms Amendment. For consistency with the statute, the paragraph includes a new paragraph in the ''Applicability'' paragraph identifying as a distinct class of covered entities those entities that are authorized to obligate or expend the Federal financial assistance in question, separate from entities that merely receive such Federal financial assistance. The paragraph also now specifies that the Federal financial assistance in question for this paragraph is that which is appropriated for the purposes of carrying out part I of the Foreign Assistance Act of 1961.

The proposed rule would have applied the requirements of this paragraph to the Department and recipients of relevant Federal financial assistance. However, 22 U.S.C. 2151b(f) and section 7018 of the Consolidated Appropriations Act of 2019 impose both requirements on what recipients of assistance can and cannot do and also requirements on the entities providing that assistance to recipients. The statute does not provide a description of the entities that provide assistance to recipients. The Department believes that class of entities is best described as those that are authorized to obligate the assistance. Accordingly, the Department is modifying § 88.3(k)(1) to apply to the Department, to recipients of relevant assistance, and to entities that are authorized by statute, regulation, or agreement to obligate the relevant assistance. Additionally, considering that the 1985 Amendment [112] has been included in annual appropriations acts rather than codified as a statute, the Department is modifying the description of covered entities' obligations under § 88.3(k)(2) to clarify that the rule's provisions regarding the 1985 Amendment apply only to funds under an appropriations act containing the 1985 Amendment.

Summary of Regulatory Changes: For the reasons described in the proposed rule [113] and above, and considering the comments received, the Department finalizes § 88.3(k) with technical changes clarifying the citations and language as to which statutes and amendments are referenced, and to more closely follow the language of such statutes and amendments as enacted by Congress, and adding clarity through citations to paragraphs within this part.

88.3(l). Newborn and Infant Hearing Loss Screening, 42 U.S.C. 280g–1(d). The Department received comments on this paragraph.

Comment: The Department received a comment asking that the rule interpret 42 U.S.C. 280g–1(d) to provide an affirmative conscience exemption for parents who do not want their children to receive a hearing loss screening.

Response: 42 U.S.C. 280g–1(d) is a rule of construction that the Department is unable to convert into an affirmative exemption. The Department can, however, enforce such rules to assure that entities administering the statute do not misapply the statute to the detriment of the conscience rights of parents and their children.

Comment: The Department received comments stating that the proposed rule would endanger public health by providing conscience protections for parents to object to compulsory medical procedures such as hearing loss screenings.

Response: The Department disagrees. 42 U.S.C. 280g–1(d) is a rule of construction, and this final rule does not convert it into an affirmative Federal exemption. This rule's enforcement provisions do not create a right for parents to object to a hearing loss screening for their children generally or as against other State or Federal laws. Rather, they only prevent interpreting this Federal law to override State laws that already provide a religious exemption regarding the screening at issue.

Summary of Regulatory Changes: For the reasons described in the proposed rule [114] and above, and considering the comments received, the Department finalizes § 88.3(l) with minor changes to ensure clarity and consistency with the statute, for example by deleting ''newborn infants or young,'' changing articles, and making other minor changes.

88.3(m). Medical Screening, Examination, Diagnosis, Treatment, or Other Health Care or Services, 42 U.S.C. 1396f. The Department received comments on this paragraph.

Comment: The Department received numerous comments supporting the rule's provision of enforcement mechanisms for 42 U.S.C. 1396f.

Other commenters opposed the enforcement mechanisms, alleging they create an affirmative mandate that a State agency that administers a State Medicaid Plan may not compel any

[111] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(j), except for the modifications adopted herein).

[112] *See, e.g.,* the Consolidated Appropriations Act, 2019, Public Law 116–6, Div. F, sec. 7018 (''None of the funds made available to carry out part I of the Foreign Assistance Act of 1961, as amended, may be obligated or expended for any country or organization if the President certifies that the use of these funds by any such country or organization would violate any of the above provisions related to abortions or involuntary sterilizations.'')

[113] 83 FR 3880, 3895.

[114] 83 FR 3880, 3895.

person to undergo any medical screening, examination, diagnosis, or treatment if such person objects on religious grounds.

Response: The Department disagrees with commenters opposing the paragraph. 42 U.S.C. 1396f is a rule of construction, and this rule does not convert it into an affirmative Federal exemption. This rule's enforcement provisions do not create a freestanding right for persons or their families to be free to decline certain medical screenings or treatments. Rather, they only prevent an interpretation of 42 U.S.C. 1396f as requiring States to compel the acceptance of such screening or treatment when the Medicaid statute has no such requirement.

Summary of Regulatory Changes: For the reasons described in the proposed rule [115] and above, and considering the comments received, the Department finalizes § 88.3(m) as proposed.

88.3(n). Occupational Illness Examinations and Tests, 29 U.S.C. 669(a)(5).

Comment: The Department received comments generally supporting the concept of conscience protections for occupational medical examinations, immunizations, and treatments, and other comments generally opposing that concept. The Department did not receive specific comments on § 88.3(n) or its implementation of the rule of construction described in 29 U.S.C. 669(a)(5).

Response: Although Congress granted HHS authority to conduct research, experiments, and demonstrations related to occupational illnesses in the Occupational Safety and Health Act of 1970, such authority did not include the power to require ''medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.'' 29 U.S.C. 669(a)(5). The Department is required to abide by this limitation, and considers it appropriate to issue a final rule ensuring compliance.

Summary of Regulatory Changes: For the reasons described in the proposed rule [116] and above, and considering the comments received, the Department finalizes § 88.3(n) with minor changes, for example, deleting ''With respect to occupational illness examinations and tests, the entities'' and replacing it with ''Entities.''

[115] 83 FR 3880, 3895.

[116] 83 FR 3880, 3895.

88.3(o). Vaccination, 42 U.S.C. 1396s(c)(2)(B)(ii). The Department received comments on this paragraph.

Comment: The Department received comments suggesting that the scope of this paragraph be expanded beyond pediatric vaccines to encompass all vaccines, or that it should be expanded to create a personal right to decline vaccinations based on moral or religious objections.

Response: The Department is aware of complaints asserting religious or moral objections to administering or receiving vaccines, including, for example, objections to administering or receiving vaccines derived from aborted fetal tissue. Because § 88.3(o) of the rule provides enforcement mechanisms for 42 U.S.C. 1396s, it is therefore limited to the scope of 42 U.S.C. 1396s. As 42 U.S.C. 1396s applies only to the pediatric vaccine program under Medicaid (the Vaccines for Children Program), the Department is unable to expand the scope of this paragraph beyond such programs. Likewise, as 42 U.S.C. 1396s requires compliance with religious or other exemptions under State law with respect to pediatric vaccines, the Department is unable to expand this rule provision to preempt State laws that do not provide such conscience protections.

Comment: The Department received comments asking for clarification as to how the proposed § 88.3(o) interacts with State laws such as school immunization requirements.

Response: Upon reviewing the proposed § 88.3(o), the Department agrees that the language can be clarified regarding how the paragraph might interact with State law. The Department therefore finalizes § 88.3(o) to more accurately reflect the text of 42 U.S.C. 1396s(c)(2)(B)(ii) by changing the applicability of the requirement of § 88.3(o)(2) to reflect the statute's requirement that, under any State-administered pediatric vaccine distribution program, the provider agreement executed by any provider registered to participate in the program includes the requirement that the program-registered provider comply with applicable State law, including any such law relating to any religious or other exemption. In order to further clarify the scope of § 88.3(o), the Department finalizes this paragraph to specify that applicable State ''law'' may include State statutory, regulatory, or constitutional protections for conscience and religious freedom, where applicable.

Summary of Regulatory Changes: For the reasons described in the proposed rule [117] and above, and considering the comments received, the Department finalizes § 88.3(o) with changes to ensure it follows the language of 42 U.S.C. 1396s(c)(2)(B)(ii), which applies to program-registered providers of pediatric vaccines, not to States generally, and to specify that applicable State law may include State statutory, regulatory, or constitutional protections for conscience and religious freedom, where applicable.

88.3(p). Specific Assessment, Prevention and Treatment Services, 42 U.S.C. 290bb–36(f), 5106i(a).

Comment: The Department received comments on this paragraph expressing concern that the provision of conscience protections for parents who object to youth suicide assessments for their children should be balanced with the risk to the child's life.

Response: Paragraph (p) in § 88.3 is a rule of construction that prevents persons or entities administering programs under 42 U.S.C. 290bb–36 or 42 U.S.C. 5106i(a) from relying on the particular statutes at issue to require assessments or treatments that conflict with religious belief. The provisions in this rule related to these statutes do not, however, prevent or interfere with any other State or Federal law that reaches a different (or the same) conclusion on these questions.

In reviewing this paragraph in light of the comments received on it, however, the Department has determined that paragraph (p)(2)(iii) needs to be modified to more closely track the statutory language, in order to ensure it operates as a rule of construction consistent with 42 U.S.C. 290bb–36(f).

Summary of Regulatory Changes: For the reasons described in the proposed rule [118] and above, and considering the comments received, the Department finalizes § 88.3(p) with changes to paragraph (p)(2)(iii) to more closely track the language of 42 U.S.C. 290bb–36(f), which establishes it as a rule of construction.

88.3(q). Religious nonmedical health care, 42 U.S.C. 1320a–1, 1320c–11, 1395i–5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j–1(b). The Department received comments on this paragraph.

Comment: The Department received comments opposed to the provision of Federal funds to religious nonmedical health care facilities because such funding could be interpreted as legitimating such facilities, resulting in

[117] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(o), except for the modifications adopted herein).

[118] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(p), except for the modifications adopted herein).

patients of such facilities not seeking other treatment options.

Response: Whether to permit Federal funds to be used to pay religious nonmedical health care facilities for particular services provided to Medicare or Medicaid beneficiaries has been determined by Congress through 42 U.S.C. 1320a–1, 1320c–11, 1395i–5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j–1(b), and the Department is unable to alter that decision. The purpose of including these provisions in the proposed rule and this final rule is only to provide enforcement mechanisms for the determination of Congress with respect to funding of religious nonmedical health care facilities. Nevertheless, the Department believes that most if not all persons who make use of religious nonmedical health care facilities do so because they hold religious objections to the receipt of medical care and would be unwilling to seek other treatment options regardless of the religious nonmedical health care facilities' funding status.

Comment: The Department received comments expressing concern that providing conscience protections for attendees of religious nonmedical health care facilities could prevent people, particularly children, from accessing necessary medical health care.

Response: This rule only provides for enforcement mechanisms for conscience protection statutes that Congress has enacted, and determinations of policy matters raised by these comments are outside the scope of this rulemaking to the extent they conflict with decisions made by Congress. That said, this provision regarding religious nonmedical health care does not prevent people from accessing care, but rather, has a role in enabling people to access care that does not violate their religious beliefs, which will benefit all patient populations, including children.

Comment: The Department received a comment stating that exempting religious nonmedical health care facilities from State standards for cleanliness and quality of care potentially threatens the quality of care that attendees of such facilities receive. The commenter proposed striking these provisions from the rule and ensuring that religious nonmedical health care facilities adhere to the same standards as other skilled nursing facilities and providers.

Response: Requiring religious nonmedical health care facilities to adhere to the same standards as other skilled nursing facilities and providers would contradict Congress's determination to exempt religious nonmedical health care facilities, as provided for in 42 U.S.C. 1396a(a) and as upheld in *Children's Healthcare Is a Legal Duty, Inc.* v. *Min De Parle,* 212 F.3d 1084 (8th Cir. 2000) (''[S]tate plans may not establish State agency oversight of the quality of care provided in RNCHIs [sic].''). The Department, therefore, rejects this proposal.

Nonetheless, the Department recognizes that the structure and description of the relevant exemptions in § 88.3(q) was unclear in many respects, and so the Department makes substantial changes to the ''Requirements and prohibitions'' to correct and clarify § 88.3(q) to more accurately describe the activities from which the applicable covered entities are required to exempt religious nonmedical health care institutions, including a change to more fully incorporate the exemption established in 42 U.S.C. 1396(a)(31).

Comment: The Department received a comment requesting that the exemptions for religious nonmedical health care facilities concerning Medicare Part A funding be explicitly applied to Medicare Advantage as well because, while Medicare Advantage is required to provide coverage for all services that are covered by Medicare Part A and Part B, many Medicare Advantage organizations do not recognize religious nonmedical health care.

Response: As noted by the commenter, because Medicare Advantage organizations are required to cover services covered by Medicare Parts A and B pursuant to 42 U.S.C. 1395w–22(a)(1)(A), the exemptions for religious nonmedical health care facilities related to Medicare Part A funding apply to Medicare Advantage as well. Because the applicability paragraphs of § 88.3(q) follow the statutory language concerning religious nonmedical health care exemptions, the Department declines to adopt the commenter's suggested modification.

Summary of Regulatory Changes: For the reasons described in the proposed rule [119] and above, and considering the comments received, the Department made significant changes to the structure of § 88.3(q) to clarify applicable statutes and paragraphs, correct typographical errors, and more closely track the statutory language. The Department more clearly articulates which paragraphs are applicable to different entities by, for example, changing ''(q)(2)(i) through (iii)'' so that it now clearly states ''(q)(2)(i), (ii), (iii), and (iv).'' The Department added ''(h)'' to the reference to 42 U.S.C. 1320a–1 to clarify the particular paragraph containing relevant information. The Department clarified in paragraph (q)(1)(ii) that some State agencies are required to comply, in paragraph (q)(1)(iii) that entities receiving Federal financial assistance from Medicare have compliance obligations, and in paragraph (q)(1)(iv) that entities including States that receive Federal financial assistance from Medicaid have compliance obligations, and in paragraph (q)(1)(v) clarified the authority related to an elder's right to practice his or her religion through reliance on prayer alone is subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j–1397m–5) and eliminated what was the last paragraph regarding the Elder Justice Block Grants. The paragraph incorporates multiple references to 42 U.S.C. 1395x(ss)(1), which defines a religious nonmedical health care institution, to add clarity to the regulation. The paragraph clarifies the application of various provisions to entities that make an agreement with the Secretary of the Department pursuant to 42 U.S.C. 1320a–1(b), or receive Federal financial assistance from Medicare, Medicaid, or Subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j–397m–5). Last, the Department removed the references requiring compliance with § 88.5, as compliance with that section is now voluntary.

Assurance and Certification of Compliance Requirements (§ 88.4)

In the ''Assurance and Certification of Compliance'' section of the proposed rule, the Department proposed to require certain recipients of Federal financial assistance or other Federal funds from the Department or that the Department administers to submit written assurances and certifications of compliance with the Federal conscience and anti-discrimination laws, as applicable, as part of the terms and conditions of acceptance of Federal financial assistance or other Federal funding from the Department. The Department stated its belief that both an assurance and a certification provide important protections to persons and entities under these laws and would be consistent with requirements under other civil rights laws. The Department noted its concern that there is a lack of knowledge on the part of States, local governments, the health care industry, and the public of the rights of protected persons and entities, and the corresponding obligations on covered entities provided by Federal conscience and anti-discrimination laws.

[119] 83 FR 3880, 3895 (stating the reasons for the proposed § 88.3(q), except for the modifications adopted herein).

Section 88.4 proposed to require certain applicants for Federal financial assistance or other Federal funds from the Department to which this part applies to submit assurances and certifications of compliance with Federal conscience and anti-discrimination laws and this part. The Department proposed that covered applicants operationalize the assurance and certification requirement by filing revised versions of applicable civil rights forms, such as the HHS–690 Assurance of Compliance Form once per year and incorporate such filing by reference in all other applications submitted that year, rather than for every application that year. To this end, and as consistent with other civil rights regulations requiring assurances or certifications, the Department proposed in § 88.4(b)(6) to permit an applicant to incorporate the assurance by reference in subsequent applications to the Department. The proposed rule explained that both the assurance and certification would constitute a condition of continued receipt of Federal financial assistance or other Federal funds from the Department. With respect to the certification required in proposed § 88.4(a)(2), proposed § 88.4(b)(7) clarified that, as with other anti-discrimination laws, a violation of the requirements of the certification may result in enforcement by the Department, as provided in § 88.7 of this part.

Noting the need to increase public awareness of Federal conscience and anti-discrimination laws, the Department solicited public comment on the various options available for public education and outreach.

Proposed paragraph (b) identified specific requirements for the proposed assurance and compliance requirements: (b)(1) Addressed the timing to submit the assurance for current applicants or recipients as of the effective date of this part; (b)(2) addressed the form and manner of such submittals; and (b)(3) addressed the duration of obligations for both the assurance and certification.

Proposed § 88.4(b)(2) explained that applicants would submit assurance and certification forms in an efficient manner specified by OCR, in coordination with the relevant Department component, or alternatively in a separate writing.

The Department proposed that its components be given discretion to phase in the written assurance and certification requirement by no later than the beginning of the next fiscal year following the effective date of the regulation. The Department stated its intent to work with recipients of Federal financial assistance or other Federal funds from the Department to ensure compliance with the requirements or prohibitions promulgated in this regulation. If the applicant or recipient would fail or refuse to furnish a required assurance or certification, the Department proposed that OCR, in coordination with the relevant Department component, would be authorized to effect compliance by any of the remedies provided in § 88.7. *See Grove City College,* 465 U.S. 555 (affirming partial termination of institution's Federal funds for refusing to sign a Title IX assurance of compliance form).

The Department also proposed that, while both recipients and sub-recipients, as defined herein, must comply with the substantive requirements of Federal conscience and anti-discrimination laws, as applicable, sub-recipients would not be subject to the requirements of § 88.4 regarding assurance and certifications of compliance. The Department invited comment on whether this approach strikes the appropriate balance between achievement of this rulemaking's policy objectives and avoidance of undue burden on the health care industry.

Proposed § 88.4(c) also contained several important exceptions from the proposed requirements for written assurance and certification of compliance, including (1) physicians, physician offices, and other health care practitioners participating only in Part B of the Medicare program; (2) recipients of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration for Children and Families, whose purpose is unrelated to health care provision as specified; (3) recipients of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration on Community Living, whose purpose is unrelated to health care provision as specified; and (4) Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act. The Department sought public comment on whether further exceptions should be made to the requirements of § 88.4 in contexts where the requirements would be unduly burdensome or in contexts unrelated to health care or medical research. The Department received comments on this section, including general comments in support of this section.

Comment: The Department received comments requesting that exemptions for religious beliefs or moral convictions, such as for vaccinations, be included in form HHS–690.

Response: The Department's implementation of the assurance and certification of compliance will address the Federal conscience and anti-discrimination laws implicated by this rule. Because none of the statutes that this rule implements create across-the-board exemptions on the basis of religious beliefs or moral convictions to vaccination requirements, the assurance and certification of compliance requirement does not either.

Comment: The Department received comments requesting that any assurance of compliance be acquired through form HHS–690 to avoid the increased administrative burden of adding new forms or procedures.

Response: The Department agrees with this proposal and is working to obtain Paperwork Reduction Act clearance for updates to the HHS–690 form entitled *Assurance of Compliance,* which previously had OMB PRA clearance as OMB No. 0945–0006. (The Department's operationalization of the certification of compliance required in § 88.4(a)(1) is described in the RIA and PRA portions of this rule.)

The HHS–690 form enables an applicant to provide an assurance that it will comply with certain Federal civil rights laws and regulations ''in consideration of and for the purpose of obtaining Federal grants, loans, contracts, property, discounts, or other Federal financial assistance'' from the Department.[120] By signing the assurance of compliance, the applicant ''agrees that compliance with this assurance constitutes a condition of continued receipt of Federal financial assistance, and that it is binding upon the Applicant, its successors, transferees and assignees for the period during which such assistance is provided.'' [121]

As finalized, § 88.4(b)(1) requires entities that are already recipients as of the effective date of the rule and applicants to submit the assurance and the certification as a condition of any application or reapplication for funds to which the rule applies. Pursuant to the finalized § 88.4(b)(6), it would be permissible to incorporate assurances and certifications by reference in subsequent applications, which is consistent with the Department's Grants Policy Statement, which states that

[120] U.S. Dep't of Health & Human Servs., Assurance of Compliance, HHS 690, *https://www.hhs.gov/sites/default/files/hhs-690.pdf.*

[121] *Id.*

because recipients file an assurance of compliance form ''for the organization and . . . not . . . for each application,'' a recipient with a signed assurance on file assures through its signature on the award application that it has a signed Form 690 on file.[122]

The Department proposed to add a provision to § 88.4(b)(1) that would require submission of the assurance more frequently than at the time of application if the applicant or recipient fails to meet a requirement of the rule, or if OCR or the relevant Department component has reason to suspect or cause to investigate the possibility of such failure. For instance, OCR may have reason to suspect through its investigations or the number of complaints received that a particular recipient is not complying with the Federal conscience and anti-discrimination laws or the rule and consequently asks the recipient to sign an assurance of compliance form offcycle from the normal grants process. To forgo as-needed assurances outside of the application process jeopardizes OCR's and the Department's flexibility to ensure that the Federal financial assistance or other Federal funds that the Department awards are used in a manner compliant with Federal conscience and anti-discrimination laws and this rule.

Comment: The Department received a comment requesting that the certification of compliance contain additional language, such as explicit protections for LGBT patients.

Response: The scope of this rule and the certifications of compliance sought herein are limited to the Federal conscience and anti-discrimination laws. Certifications with respect to other topics or laws not the subject of this rule are outside the scope of this rulemaking.

Comment: The Department received a comment stating that conditioning receipt of Federal financial assistance or Federal funds on receipt of an assurance and certification is unnecessary in light of the proposed enforcement mechanisms provided by § 88.7.

Response: The Department does not agree. This collection of assurances and certifications would facilitate the Department's obligation to ensure that the Federal financial assistance or other Federal funds that the Department awards are used in a manner that complies with Federal conscience and anti-discrimination laws and this rule. The Department is accountable to the American public for protecting the integrity of Federal financial assistance and other Federal funds that the Department awards. The Department's administration of a requirement for a person or entity at the time of application or reapplication to assure and certify compliance with Federal conscience and anti-discrimination laws and the final rule demonstrates that the person or entity was aware of its obligations under those laws and the rule.

In addition, this collection of assurances and certifications would operationalize the obligations of persons and entities to comply with applicable Federal conscience and anti-discrimination laws. As discussed above, the Department has the authority to place terms and conditions with respect to the Federal conscience and anti-discrimination laws in any instrument HHS issues or to which it is a party (*e.g.,* grants, contracts, or other HHS agreements). A Department component extending an award must communicate and incorporate statutory and public policy requirements and obligate the recipient to comply with Federal statues and ''public policy requirements, including . . . those . . . prohibiting discrimination.'' [123] More specifically, the Department component ''must communicate . . . all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.'' [124] To execute this obligation, the Departmental component may require a recipient ''to submit certifications and representations required by Federal statutes, or regulations . . . .'' [125]

Furthermore, the proposed requirements of § 88.4 are consistent with the requirements of other Federal civil rights laws and would bring Federal conscience and anti-discrimination laws into parity with those other civil rights laws. Although instituting an enforcement action against an entity is effective in ensuring that the enforced-against entity is aware of its requirements under the statutes implemented through this rule, the requirement of an assurance and certification of compliance would ensure that such awareness is shared by entities subject to proposed § 88.4 before violations occur and may help prevent them.

Comment: The Department received a comment stating that the requirement that covered entities provide assurances and certifications of compliance could lead to third-party *qui tam* lawsuits parallel to the Department's enforcement actions.

Response: Whether a third-party may bring or prevail in a *qui tam* lawsuit with respect to an assurance or certification required by this rule is a legal question dependent on statutes and precedent governing *qui tam* lawsuits and is beyond the scope of this rulemaking. The Department does not consider the possibility that such laws may apply as a sufficient reason not to require assurance or certification of compliance with Federal conscience and anti-discrimination laws in order to achieve the goals described in this Final Rule for requiring such assurance or certification.

Comment: The Department received a comment stating that the proposed rule is unclear as to whether a person that falls within one of the exempt categories described in § 88.4(c)(1) and (2) remains exempt if such person receives Federal funds under a separate agency or program.

Response: The Department does not agree that the proposed rule is unclear as to whether such a person would remain exempt. Proposed § 88.4(c) states that certain persons or entities shall not be required to comply with paragraphs (a)(1) and (2) of § 88.4 ''provided that such persons or entities are not recipients of Federal financial assistance or other Federal funds from the Department through another instrument, program, or mechanism, other than those set forth in paragraphs (c)(1) through (4) of this paragraph.'' Therefore, a person who would be exempt under one of these provisions, but receives Federal financial assistance or other Federal funds from a non-exempt HHS program, is no longer exempt.

''Federal financial assistance'' as used in the phrase ''Federal financial assistance or other Federal funds from the Department'' should be read to mean such assistance from the Department. Therefore, a person that falls within one of the exempt categories described in § 88.4(c)(1) and (2) remains exempt if such person receives Federal financial assistance from an agency or department other than HHS.

Comment: The Department received a comment stating that the proposed rule is unclear because, while the rule states that it is appropriate to exempt clinicians who are part of State Medicaid programs, such clinicians are not included in the exemptions of § 88.4(c).

[122] U.S. Dep't of Health & Human Serv., HHS Grants Policy Statement, I–31 (Jan. 2007), *https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

[123] 45 CFR 75.300(a).

[124] *Id.*

[125] *Id.* sec. 75.208.

Response: The exclusion in § 88.4(c) does not need to explicitly exempt State Medicaid program clinicians because such participants are already excluded from § 88.4's application by virtue of being sub-recipients of the Department, not recipients. States are the direct recipients of Medicaid funding from the Department, and States may offer Medicaid benefits on a fee-for-service (FFS) basis, through managed care plans, or both. Regardless of the model that the States use, clinicians are sub-recipients as this term is used in this rule. Under the fee-for-service model, the State pays the clinicians directly and under the managed care model, a State pays a fee to a managed care plan, which in turn pays the clinician for the services a beneficiary may require that are within the managed care plan's contract with the State to serve Medicaid beneficiaries.[126] The 2008 Rule expressly exempted State Medicaid program clinicians because the certification requirement applied to recipients and sub-recipients; [127] in contrast, the certification requirement in this rule applies to recipients only.[128]

Comment: The Department received a comment stating that, while some pharmacies and pharmacists participate in Medicare Part B, the exemption for health care practitioners in § 88.4(c) does not explicitly include pharmacists and pharmacies, and ''health care practitioners'' may not be understood to include pharmacists or pharmacies.

Response: The Department agrees with the commenter's observation and, accordingly, will finalize § 88.4(c)(1) to explicitly include pharmacists and pharmacies within the exemption if they participate in Medicare Part B and are not otherwise subject to this part.

Comment: The Department received a comment asking that the exemption in § 88.4(c) be expanded to include participants in Medicare Part C as well as Part B.

Response: In contrast to doctors and other health care practitioners who participate in Medicare Part B and are considered recipients under this rule because these providers receive direct payments from the Centers for Medicare & Medicaid Services, Medicare Part C (Medicare Advantage) providers are not recipients, as defined by this rule, but instead are sub-recipients. Under the Medicare Part C program, HHS makes payments to the private plan, which is the recipient for the purpose of Medicare Part C, and the plan pays the provider, which under this rule would be considered a sub-recipient.[129] Therefore, § 88.4(c) does not need to exempt Medicare Part C providers because, as a threshold manner, the assurances and certifications requirement of § 88.4 do not apply to providers participating in Medicare Part C. The same is true of participants in Medicare Part D.[130]

Comment: The Department received a comment asking that the assurance and certification of compliance provisions become effective one year after the final rule is published or provide a one-year safe harbor to entities that make a good faith effort to inform their employees about the Federal conscience and anti-discrimination laws and come into compliance.

Response: Although ultimate responsibility for compliance resides with covered entities, OCR plans to do significant outreach and public education to inform covered entities of their obligations and timelines. Recipients are also free to inform their employees about Federal conscience and anti-discrimination laws through policies and procedures or internal communications efforts, such as by posting notices of rights under Federal conscience and anti-discrimination laws, using the model in appendix A to 45 CFR part 88. Section 88.5 of this rule no longer requires recipients to post notices, but OCR will consider the posting of notices as non-dispositive evidence of compliance if OCR were to investigate the recipients' compliance with Federal conscience and anti-discrimination laws. Because the notice provision is being finalized as a voluntary best practice that serves as non-dispositive evidence of compliance, there is no deadline for posting of notices.

Summary of Regulatory Changes: For the reasons described in the proposed rule [131] and above, and considering the comments received, the Department finalizes § 88.4 with the following changes: A change to paragraph (b)(1), deleting ''applicants or recipients'' and replacing with ''entities'' for accuracy; a change to paragraph (b)(1) to insert ''or any applicants'' and to insert ''application or'' to clarify that new applicants are included; a change to paragraph (b)(1), regarding timing, to clarify that submission of assurance and certifications may be required on a more frequent basis if ''OCR or the relevant Department component has reason to suspect or cause to investigate the possibility of [a] failure'' to meet a requirement of this part; changes to paragraph (b)(6) to clarify that both prior assurances and certifications may be incorporated by reference; a change to the end of paragraph (b)(7) by adding the phrase ''including by referral to the Department of Justice, in coordination with the Department's Office of General Counsel, where appropriate'' as discussed above; a change to paragraph (b)(8) to replace ''remedies'' with ''mechanisms'' for accuracy; and a change to paragraph (c)(1) to include pharmacies and pharmacists in the list of Medicare Part B exclusions.

Notice of Rights Under Federal Conscience and Anti-Discrimination Laws (§ 88.5)

The NPRM proposed requiring the Department and recipients to notify the public, patients, and workforce, which may include students or applicants for employment or training, of their protections under the Federal conscience and anti-discrimination laws and this rule.

For consistency with other notice requirements in civil rights regulations, paragraph (a) of § 88.5 proposed to require the Department and recipients to post the notice provided in Appendix A of the proposed rule within 90 days of the effective date of this part. This proposed notice would advise persons and entities about their rights and the Department's and/or recipients' obligations under Federal conscience and anti-discrimination laws. The notice would provide information about how to file a complaint with OCR. The Department sought comment on whether there are categories of recipients that should be exempted from this requirement to post such notices. The proposed rule did not propose to require sub-recipients to post the notice.

The proposed rule would require all Department components and recipients to use the notice text in appendix A of the proposed rule. The Department invited comment on whether the proposed rule should permit recipients to draft their own notices for which the content meets certain criteria and does not compromise the intent of § 88.5.

Proposed paragraph (b) set forth two categories of locations where the notice

[126] *See, e.g.,* Provider Payment and Delivery Systems, MACPAC, *https://www.macpac.gov/medicaid-101/provider-payment-and-delivery-systems/* (last visited Jan. 29, 2019).

[127] 73 FR at 78101.

[128] *Compare* 2008 Rule, 73 FR at 78098 (requiring sub-recipients to provide the Certification of Compliance set out in the rule as part of the sub-recipient's original agreement with the recipient) *with* § 88.4(a)(1)–(2) *infra* (requiring an applicant or recipient to submit an assurance and certification).

[129] *See Medicare Advantage Program Payment System,* MEDPAC 1 (Oct. 2016), *http://www.medpac.gov/docs/default-source/payment-basics/medpac_payment_basics_16_ma_final.pdf* (describing the payment system).

[130] *See id.*

[131] 83 FR 3880, 3896–3897 (stating the reasons for the proposed § 88.4, except for the modifications adopted herein).

would be required to appear: On the Department's and recipient's website(s), and in a physical location of each Department and recipient establishment where notices to the public and notices to their workforce are customarily posted. With regard to the physical posting, paragraph (b)(2) would impose readability requirements without identifying prescriptive font-size or other display requirements.

Proposed paragraph (c) would incentivize recipients to display the notice in locations other than their websites and physical establishments. The Department explained that, in the event that the OCR Director, pursuant to the enforcement authority proposed in § 88.7, investigates or initiates a compliance review of a recipient, the OCR Director would consider, as one of many factors with respect to compliance, whether the recipient posted the notice in the documents described in paragraphs (c)(1) through (3), as applicable. Because this part regulates a diverse range of recipients, the Department identified three categories of documents most common across all recipients for proposed listing in paragraph (c). The Department sought comment on the proposed approach of paragraph (c) and on the categories of documents identified in paragraphs (c)(1) through (3).

Finally, paragraph (d) of § 88.5 proposed to permit recipients to combine the text of the notice required in paragraph (a) with other notices under the condition that the recipients retain all of the language provided in Appendix A of the proposed rule in an unaltered state. The Department requested comment on whether the proposed paragraph (d) struck the best balance based on recipients' experiences. The Department received comments on this section, including comments that were general expressions of support or opposition to proposed § 88.5.

Comment: The Department received comments objecting to the burdens of required notices, and stating that none of the Federal conscience and anti-discrimination laws give the Department authority to issue the notice requirements of § 88.5.

Response: The Department has considered these and other comments objecting to the notice requirements of the proposed rule. Each Federal conscience and anti-discrimination law requires the Department and covered entities to comply with its substantive provisions. Notice of rights under those provisions is an important means of ensuring proper compliance. Notices are also commonly used in ensuring compliance with other Federal civil rights protections.

At the same time, the Department appreciates the potential burden of such notices and the fact that they are not explicitly required by statute. In response to comments concerning notice requirements, the Department is finalizing § 88.5 to change the notice provision from a requirement to a voluntary action and to accept self-drafting of notices to provide greater tailoring to individual circumstances.

In investigating complaints and initiating compliance reviews, OCR will consider the extent to which entities post notices, as well as the inclusion of such notices in the type of documents identified in the proposed rule at § 88.5(c), according to the rule's notice provisions as non-dispositive evidence of compliance with the substantive provisions of this rule applicable to such entities. The existence or not of posted or published notices may also be considered in the determination of potential corrective action in cases of violation.

The Department believes that the change of the notice provisions of this rule from a requirement to a voluntary action to be considered in complaint investigations addresses any concerns about the Department's authority to implement mandatory notice provisions. Providing guidance on notices and considering notices with respect to enforcement, including corrective action, are matters concerning the government of the Department and the performance of Department business as authorized by the authorities discussed *supra* at part III.A.

Comment: The Department received a comment stating that, although the commenter approves of the notice proposed in Appendix A of the NPRM, the commenter believes that recipients should be free to draft their own notice if they desire, so long as they clearly state what protections are available under the law. The commenter proposes that permitting recipients to draft their own notice will permit them to tailor the notice to their unique settings and avoid possible unintentional misrepresentations that may arise based on their status. The commenter proposes that any such recipient-drafted notice could be required to state where the text of Appendix A may be found or to provide such text upon request.

Response: The Department agrees that recipients should be permitted to draft their own notices so as to avoid misrepresentations and to tailor their notice to their particular circumstances and is modifying § 88.5 to acknowledge and accept self-drafted notices to provide greater flexibility.

Comment: The Department received a comment stating that recipients should not be permitted to deviate from the text of the proposed notice in Appendix A, because deviations from the text of appendix A could describe Federal conscience and anti-discrimination laws in subtly incorrect manners and the Department would be forced to expend additional resources to determine whether myriad notices are accurate.

Response: While the Department agrees that a fixed notice avoids the concern that a recipient-drafted notice will subtly misstate the protections provided by the rule and mitigates the time and expense of ensuring that self-drafted notices are accurate, the Department is convinced by other commenters that permitting recipients to draft their own notices is preferable, so as to provide greater flexibility and avoid statements that might be false or misleading in the context of, and considering the status of, a particular recipient. To the extent that covered entities misstate statutory protections in the drafting of their own notices, they risk such misstatement being considered by the Department negatively during complaint investigation or compliance reviews.

Comment: The Department received a comment stating that recipients should be permitted to combine this notice with other notices.

Response: Under the proposed § 88.5(d), an entity would be permitted to combine this notice with other notices ''if it retains all of the language provided in appendix A of this part in an unaltered state.'' Because the Department has made the notice provision voluntary and permits recipients to draft their own notices, the requirement that such combination maintain the language of appendix A ''in an unaltered state'' is removed.

Comment: The Department received comments stating that requiring that the notices be posted by April 26, 2018, is unreasonable. The Department also received comments asking that § 88.5 not be required until one year after the final rule is published.

Response: Because the notice provision is being finalized as a voluntary practice that serves as non-dispositive evidence of compliance in investigations and compliance reviews, the notice provision no longer has a timeframe in which such notices must be posted.

Comment: The Department received comments stating that the broad, general language proposed in appendix A could lead a health care provider to believe

that they may violate Federal non-discrimination laws or the Emergency Medical Treatment and Active Labor Act.

Response: The Department disagrees. The broad nature of the proposed language in appendix A specifically avoids implying that providers have a categorical, unconditional right under Federal law to exercise conscientious objections. The notice text is clear that only ''certain health-care related treatments, research, or services'' are covered by the Federal conscience and anti-discrimination laws, and only states that providers ''may,'' in a given circumstance, be protected by the rule. Nothing in the language of the proposed notice states that other Federal laws are waived. The appendix continues to serve as a valid model notice.

Comment: The Department received comments stating that the proposed notice should require mention of an exemption for vaccinations.

Response: As stated above, the Department has changed its approach to the notice provisions, and they are now voluntary and flexible. In addition, with respect to vaccination, this rule provides for enforcement of 42 U.S.C. 1396s(c)(2)(B)(ii), which requires providers of pediatric vaccines funded by Federal medical assistance programs to comply with any State laws relating to any religious or other exemptions, but this rule does not create a new substantive conscience protection concerning vaccination, nor does it require a State to adopt such an accommodation. In investigating a complaint or conducting a compliance review, OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.

Comment: The Department received a comment stating that the statutes referenced by the proposed notice in appendix A do not apply to health plan employees and, thus, the proposed notice is overly broad.

Response: While the Department disagrees that the statutes referenced by the proposed notice cannot apply to health plan employees, the Department agrees that the proposed appendix A could be misleading for a particular entity, and has modified both § 88.5 to provide greater flexibility as to content and appendix A to provide a more accurate model notice as to the protections provided by the Federal conscience and anti-discrimination laws.

Comment: The Department received a comment stating that if a patient sees the proposed notice, such patient may be less likely to engage in open conversation with the patient's health care provider for fear that services will be denied.

Response: The Department disagrees that a statement of the requirements of certain Federal civil rights laws will discourage patients from engaging in open conversation with their health care providers. First, the overwhelming number of patient-physician interactions do not involve issues that are likely to raise religious or moral considerations. Second, knowing that health care providers are free to work according to their own consciences could encourage patients to engage in open conversation, either by raising the subject where it might not have otherwise been discussed, or because a patient may prefer a health care provider with values consistent with their own. Third, as discussed previously, compliance with the Federal conscience and anti-discrimination laws and this implementing rule would likely increase the diversity of providers and health care professionals, thus providing patients more tailored options and higher quality service on average. Finally, the Department does not believe that, when members of the public are simply informed about Federal laws, they are thereby dissuaded from engaging in conversation with their health care providers.

Comment: The Department received comments stating that the proposed rule was unclear as to who is responsible for posting the notice required by § 88.5.

Response: Paragraph (a) in § 88.5 states that ''the Department and each recipient'' should post the notice text. Because the notice provisions in the rule will now be voluntary, this provision is deleted from § 88.5(a) as finalized. Nevertheless, because the voluntary posting of notices may be considered by the Department in its handling of complaints and compliance reviews, entities specifically subject to this rule (such as certain recipients of Federal funds) would be the appropriate parties for ensuring that such notices are posted if they chose to post them.

Comment: The Department received comments stating that health insurance issuers should not be required to provide the notice to the public.

Response: To the extent the commenters took this position because they did not believe that the protections of the Federal conscience and anti-discrimination laws would apply to health insurance issuers, the Department disagrees with such assumption. The notice provision is being finalized not as a requirement, but as guidance on best practices that the Department will consider in complaint investigation and compliance reviews. Certain Federal conscience and anti-discrimination laws clearly implicate health insurance issuers; accordingly, in investigation of complaints or compliance reviews involving health insurance issuers, the Department may consider whether the issuer has posted such a notice as non-dispositive evidence of compliance with the rule. If a health insurance issuer is subject to provisions of the rule, as at least some will be, notice provided by an insurer to both its employees and the public are appropriate factors to consider as evidence of compliance with this rule.

Comment: The Department received a comment stating that requiring the proposed notice to be displayed in emergency rooms may violate the Emergency Medical Treatment and Active Labor Act because patients who see the notice may leave before they are treated.

Response: The Department disagrees. The regulations enacted under the Emergency Medical Treatment and Active Labor Act at 42 CFR 489.20(q)(1) require that public notices be posted in emergency rooms to inform patients of the requirements of EMTALA. Furthermore, while the Department disagrees that a notice of Federal conscience and anti-discrimination laws would in any way discourage a patient seeking emergency treatment, a patient's voluntary refusal to seek treatment would not be a violation of EMTALA.

Comment: The Department received a comment proposing that, instead of specifying particular locations for the notice to be placed, the rule instead require covered entities to provide the notice using the same means that such entities regularly use to provide important notices.

Response: The Department believes that the proposed rule's specificity with respect to how to place the notice provides appropriate guidance on how to effectively communicate its content to the intended audiences. Because the notice provisions are now voluntary, but the posting of such notices would be considered as positive evidence of compliance, covered entities will have flexibility regarding whether, how, and where they post notices. At the same time, if entities post notices only in contexts or ways where persons to whom the notices are directed are not likely to receive the benefit of the notices, the Department will take that

into consideration in investigations and compliance reviews. The notice provisions under this final rule provide appropriate suggestions for effective placement while still acknowledging that not all circumstances are identical.

Comment: The Department received comments stating that there should be no exceptions to the notice requirement in § 88.5.

Response: The Department appreciates the comments, but has decided not to finalize the notice provision as a requirement. The notice provision is being finalized as a voluntary best practice that the Department will consider in complaint investigation and compliance reviews.

Summary of Regulatory Changes: For the reasons described in the proposed rule [132] and above, and considering the comments received, the Department finalizes § 88.5 with changes so that notices are not required, but will be a voluntary best practice that may demonstrate compliance in any OCR investigation. The rule specifies that OCR may, in investigating complaints and conducting compliance reviews, consider the extent to which covered entities post notices according to the rule's notice provisions as non-dispositive evidence of compliance with substantive provisions of the rule applicable to covered entities. The section also now permits recipients to draft their own version of the notice, or to combine the notice with other non-discrimination notices, to allow greater accuracy, flexibility, and tailoring to their particular circumstances. The Department also changes the section to reflect that, while guidance regarding particular placement of notices remains a factor for compliance consideration purposes, all notice placement provisions may not be applicable or appropriate to all covered entities. The Department also changes the section to remove the requirement that the notice be posted within 90 days of the publishing of the rule, or, with respect to new recipients, within 90 days of becoming a recipient, to reflect that posting of the notice is voluntary and that there is no mandated time frame within which a notice must be posted. The Department also changes the section to include, in paragraphs (b)(3) and (4), ''the Department'' in addition to recipients, for additional clarity. Finally, the Department makes a technical change to relocate the proposed rule's provision regarding the readability of the notice text from paragraph (b)(2) in the proposed rule to paragraph (b)(6) in the final rule.

Compliance Requirements (§ 88.6)

This section of the proposed rule identified specific requirements for compliance with the Federal conscience and anti-discrimination laws. The Department proposed to subject recipients to the imposition of funding restrictions and other appropriate remedies if they or a sub-recipient is found to have violated a Federal conscience and anti-discrimination law. The Department proposed to require recipients, sub-recipients, and agency components to maintain records evidencing compliance with these laws and the proposed rule and to require such entities to cooperate with any OCR compliance review or investigation (including by producing documents or participating in interviews). The proposed rule further would require recipients and sub-recipients to inform any Departmental funding component, and to disclose, on applications for Departmental funding, the existence of any OCR compliance review, investigation, or complaint under the rule. This section also addressed claims in the event a covered entity intimidates or retaliates against those who complain to OCR or participate in or assist in an OCR enforcement action. The Department received comments suggesting improvements to this section, as well as comments generally supporting proposed § 88.6.

Comment: The Department received comments stating that it is unduly burdensome and unnecessary to require recipients to report to the Department funding component all compliance reviews, investigations, and complaints when they occur and to disclose any compliance review, investigation, or complaint for five years prior in any application for new or renewed Federal financial assistance or Departmental funding. Commenters noted that such requirements are burdensome on the covered entities, are unnecessary if an investigation found no violation, and require the covered entity to provide the Department with information that the Department should already have.

Response: The Department agrees that such reporting requirements are unnecessary in situations in which an investigation has found no violation. The Department also agrees that the provision of such reports to funding components of the Department for already awarded Federal financial assistance or Departmental funding is unnecessary because the Office for Civil Rights can notify such funding components at the time such a determination of violation is made. The Department disagrees that such records of violations are unnecessary as to future awards of Federal financial assistance or Departmental funding, because the Department does not maintain records of all such findings in a manner that is generally accessible to funding components across the Department.

Therefore, the Department is revising the reporting requirements under § 88.6 to reduce the burden on covered entities and to eliminate the reporting requirements in situations in which such reports are unnecessary or redundant with actions that will be taken by the Department. The final rule retains the requirement that recipients or sub-recipients subject to a determination by OCR of noncompliance with this part must, in any application for new or renewed Federal financial assistance or Departmental funding following such determination, disclose the determination of noncompliance. The rule also clarifies that applicants must also disclose OCR determinations made against their sub-recipients under previous or existing contracts, grants, or other instruments providing Federal financial assistance. Sub-recipients would only have to disclose findings made against them if they are seeking new or renewed funding as recipients of HHS funds or Federal financial assistance. The final rule shortens the period for reporting from five years to three years.

Comment: The Department received comments stating that none of the Federal conscience and anti-discrimination laws authorize the Department to require record-keeping, conduct compliance reviews, or investigate complaints.

Response: As discussed *supra* at part III.A, various statutes and regulations authorize the Department to issue these regulations. The Department, and entities to which this rule applies, are required by statute to comply with various Federal conscience and anti-discrimination laws. Inherent in Congress's adoption of the statutes that require the recipients of Federal funds from the Department to comply with certain Federal health conscience statutes is the authority of the Department to take measures to ensure compliance. Further, complaint investigation, compliance reviews, and record-keeping are standard measures that the Department employs with respect to the grants and contracts that it issues—to ensure compliance with requirements imposed by Congress with respect to particular programs and on

[132] 83 FR 3880, 3897–98 (stating the reasons for the proposed § 88.5, except for the modifications adopted herein).

recipients of Federal funds, including statutory non-discrimination requirements. Below, the Department discusses in more detail objections to the Department's authority to conduct compliance reviews.

Issuing this rule as finalized provides for the application and imposition of standard Departmental terms, conditions, and procedures to ensure compliance by recipients with statutory non-discrimination requirements, pursuant to the Department's authorities discussed *supra* at part III.A. Those authorities allow, among other things, the imposition of terms and conditions on grant awards, contracts, and other funding instruments, and authorize the Department to require certain information from entities applying for such funds.

Comment: The Department received comments requesting more specificity as to how long records should be maintained, in what form or manner they should be maintained, and what content such records should include.

Response: The Department agrees that greater specificity as to the records that should be maintained, how long such records should be maintained, and in what format such records should be kept is appropriate. Therefore the Department will finalize the rule with modifications specifying that records (1) shall be maintained for a period of three years from the date the record was created, was last in force, or was obtained, by the recipient or sub-recipient; (2) shall contain any information maintained by the recipient or sub-recipient that pertains to discrimination on the basis of religious belief or moral conviction, including any complaints; statements, policies, or notices concerning discrimination on the basis of religious belief or moral conviction; procedures for accommodating employees' or other protected individuals' religious beliefs or moral convictions; and records of requests for such religious or moral accommodation and the recipient or sub-recipient's response to such requests; and (3) may be maintained in any form and manner that affords OCR with reasonable access to them in a timely manner. These modifications are consistent with recordkeeping requirements employed in other civil rights regulations. For example, the Department of Justice imposed three-year record maintenance for self-evaluations [133] required under regulations implementing section 504 of the Rehabilitation Act, and the Department or the Department of Justice imposed similar requirements in regulations under Title II of the Americans with Disabilities Act, the Age Discrimination Act of 1975, and Title IX of the Education Amendments of 1972.[134] And HHS regulations under Title VI, Age Discrimination Act of 1975, and Titles VI and XVI of the Public Health Service Act generally require that a recipient maintain records necessary to determine whether the recipient has complied with the law.[135]

Comment: The Department received a comment requesting that the requirements of § 88.6 not go into effect until at least one year after the publication of the final rule.

Response: The Department believes that covered entities will have sufficient time to begin abiding by the requirements of § 88.6 60 days after the publication of this final rule. To the extent that entities have specific reasons why they cannot comply within that timeframe, the Department will consider exercising enforcement discretion and take those reasons into consideration during any investigation of complaints that may arise.

Comment: The Department received comments requesting that the imposition of funding restrictions or other remedies on recipients based on their sub-recipients' violations of Federal conscience and anti-discrimination laws be made discretionary instead of mandatory because some recipients may have limited control over their sub-recipients.

Response: As with other anti-discrimination regulations OCR enforces, such as the Age Discrimination Act (45 CFR 90), Title IX (45 CFR 86), and Title VI (45 CFR 80), this rule assures that Federal funds channeled from recipients to sub-recipients do not become immune to the protections provided by conscience and associated anti-discrimination laws. The Department, however, agrees that the rule should reflect greater enforcement discretion, and will finalize § 88.6(a) by changing ''shall'' with respect to the imposition of funding restrictions ''and'' other remedies to read ''may'' and ''or,'' respectively.

Summary of Regulatory Changes: For the reasons described in the proposed rule [136] and above, and considering the comments received, the Department finalizes § 88.6 with substantial changes as described above, by making a technical correction to provide OCR with greater enforcement discretion concerning the responsibility of recipients for violations of the rule by sub-recipients, by changing ''shall'' to ''may'' in paragraph (a); by providing greater specificity as to the records covered entities are required to maintain and for how long in paragraphs (b)(1) through (3); by making a technical correction to provide greater clarity on how a covered entity's failure to cooperate may result in an OCR referral to the Department of Justice by inserting ''in coordination with the Department's Office of General Counsel'' in paragraph (c); by making a technical correction, in keeping with the Department's intent for § 88.6 to mirror Title VI enforcement regulations where applicable, to add a provision regarding the time and manner of OCR's access to records, and the applicability of confidentiality and privacy concerns to OCR's access in paragraph (c); by shortening from five years to three years in paragraph (d) the period for disclosing in any application for new or renewed Federal financial assistance or Departmental funding any determination by OCR of noncompliance to reduce the burden on covered entities; by revising reporting requirements in paragraph (d) to reduce the burden on covered entities by eliminating reporting requirements in situations in which such reports are unnecessary or redundant with actions taken by the Department, such as disclosing the existence of complaints, compliance reviews, or investigations in any application for new or renewed Federal financial assistance or Departmental funding; and by making a technical correction at the end of paragraph (d) to clarify that recipients disclose any OCR determinations made against their sub-recipients.

Enforcement Authority (§ 88.7)

This section of the proposed rule reaffirmed the delegation to OCR of the Department's authority to enforce the Federal conscience and anti-discrimination laws, in collaboration with the relevant Department components. The Department also noted that OCR has been expressly delegated the authority to enforce the Church, Coats-Snowe, and Weldon Amendments

[133] *See, e.g.,* ''A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.'' 28 CFR 35.105(a).

[134] *See* 45 CFR 84.6(c) and 85.11(c), 28 CFR 35.105(c), 45 CFR 90.43(b), and 45 CFR 86.3(d), respectively.

[135] *See* 45 CFR 80.6(b), 45 CFR 90.42(a) and 91.31, and 42 CFR 124.605(b), respectively.

[136] 83 FR 3880, 3898 (stating the reasons for the proposed § 88.6, except for the modifications adopted herein).

since the 2008 Rule, which was reaffirmed in the 2011 Rule. Enforcement of section 1553 is also expressly delegated to OCR in the ACA. The NPRM provided notice that the Secretary delegated to OCR the authority to enforce all Federal conscience and anti-discrimination laws that were the subject of the proposed rule.

This section also proposed to specify that OCR's enforcement authority would include the authority to handle complaints, perform compliance reviews, investigate, and seek appropriate action (in coordination with the leadership of any relevant HHS component) that the Director deems necessary to remedy the violation of Federal conscience and anti-discrimination laws and the proposed regulation, as allowed by law. The proposed text of § 88.7 of this part would provide OCR discretion in choosing the means of enforcement, from informal resolution to more rigorous enforcement leading to, for example, funding termination, as appropriate to the particular facts, law, and availability of resources.

The Department also proposed to explicitly establish its authority to investigate and handle (a) alleged violations and conduct compliance reviews whether or not a formal complaint has been filed, and (b) ''whistleblower'' complaints, or complaints made on behalf of others, whether or not the particular complainant is a person or entity protected by Federal conscience and anti-discrimination laws.

In this section of the proposed rule, the Department proposed to adopt the enforcement procedures for other civil rights laws, such as Title VI and section 504 of the Rehabilitation Act, for the Federal conscience and anti-discrimination laws. The Department solicited comments on what administrative procedures or opportunities for due process the Department should, as a matter of policy, or must, as a matter of law, provide (1) with respect to the remedial and enforcement measures that the Department may consider imposing or utilizing in response to a failure or threatened failure to comply with Federal conscience and anti-discrimination laws or this part, (2) before the Department may terminate Federal financial assistance or other Federal funds from the Department, or (3) before the Department may implement any or all of the remedial measures identified in § 88.7(i)(3) of the proposed rule. For example, comment was requested on whether the proposed rule should establish notice, hearing, and appeal procedures similar to those established in the Department's regulations implementing Title VI of the Civil Rights Act of 1964, at 45 CFR 80.8–80.10. The Department also requested comment on whether and in what circumstances it would be appropriate to require remedies against a recipient for the violations of a sub-recipient, or against entities' subsidiaries that are found to be in violation of any Federal conscience and anti-discrimination law or the proposed regulation.

The Department received comments on this section, including those generally supporting the proposed § 88.7.

Comment: The Department received comments stating that the Federal conscience and anti-discrimination laws do not provide the Department with the authority to conduct compliance reviews under these statutes or to engage in the investigatory actions provided for in § 88.7. The Department also received a comment stating that conducting a compliance review without having received a complaint is unreasonable.

Response: Inherent in Congress's adoption of the statutes that require the recipients of Federal funds from the Department to comply with certain Federal health conscience statutes is the authority of the Department to take measures to ensure compliance. This is especially true in light of the fact that courts have refused to recognize private rights of action under certain statutes that are the subject of this rule, thus leaving victims of unlawful discrimination with no possible remedy without the Department's intervention. Further, under the various statutes and regulations governing HHS grants, contracts and other programs discussed in part III.A above concerning the authority to issue this rule, the Department has authority to ensure that both it, and covered entities, are spending Federal funds and operating programs consistent with Federal laws applicable to those funds and programs. The Secretary similarly has authority under 5 U.S.C. 301 to prescribe regulations for the government of the Department and the distribution and performance of its business. Providing for Departmental procedures to ensure compliance, including to undertake compliance reviews, falls under such authorities.

As for their reasonableness, compliance reviews are a standard tool for ensuring compliance with Federal nondiscrimination statutes, despite the fact that most Federal nondiscrimination statutes, such as Title VI of the Civil Rights Act of 1964, do not explicitly mention them. Executive Order 12250 directed the Attorney General to implement regulations that addressed investigations and compliance reviews for the Federal nondiscrimination statutes. The order also directed agencies administering Federal nondiscrimination statutes to implement directives, via either policy guidance or regulations, consistent with the Attorney General's regulations. Regulations subsequently promulgated by the Department of Justice regarding coordination of Title VI compliance, pursuant to Executive Order 12250, interpret Title VI as authorizing Federal agencies to conduct compliance reviews for Title VI enforcement. *See, e.g.,* 28 CFR 42.407(c)(1) (''Federal agencies shall establish and maintain an effective program of post-approval compliance reviews regarding approved new applications (*see* 28 CFR 50.3(c) II A), applications for continuation or renewal of assistance (28 CFR 50.3(c) II B) and all other federally assisted programs.'').

Nevertheless, in order to address these concerns, the Department is finalizing § 88.7(c) with certain changes to clarify that OCR may conduct compliance reviews based on information from a complaint or other source that causes OCR to suspect non-compliance by an entity subject to the rule.

Comment: The Department received comments stating that, to provide clarity for covered entities and to ensure fairness of enforcement, potential penalties set forth in the rule should be clear and uniform.

Response: The Department agrees with this comment in part. Potential penalties vary among the Federal conscience and anti-discrimination laws as set by Congress. In addition, to the extent penalties may be imposed involuntarily, regulations such as those that apply to HHS grants, contracts, and CMS programs discussed above provide a well-established process for enforcing compliance with the terms and conditions of grants and contracts and programmatic regulations that require compliance with certain non-discrimination provisions. Consequently, in order to increase the clarity and uniformity of involuntary remedial processes applied through this rule, the Department has concluded that penalties imposed involuntarily under this rule will be imposed through those applicable regulations, such as 45 CFR part 75, or the FAR and HHSAR. This is preferable both to an independent framework mirroring those of Title VI

and section 504 of the Rehabilitation Act, as the Department had proposed, and to a new set of uniform penalties as the commenter may have been proposing. Under this rule, in the event the Department deems that involuntary remedies may be appropriate, OCR will coordinate with the relevant funding component(s) of HHS in pursuing such remedies.

Comment: The Department received a comment stating that conducting a compliance review without having received a complaint is unreasonable.

Response: The Department disagrees. The Department's Office for Civil Rights routinely conducts compliance reviews to ensure covered entities follow the requirements of other Federal civil rights laws, as well as the Health Insurance Portability and Accountability Act of 1996 and its associated regulations.[137] Providing for compliance reviews to ensure that Federal conscience and anti-discrimination laws are not violated brings the Department's ability to enforce such laws into parity with other civil rights laws that the Department enforces.

Comment: The Department received comments stating that proposed § 88.7 does not provide for adequate due process.

Response: The Department agrees in part, and is finalizing the rule to make use of remedial processes under other existing HHS regulations. As clarified herein, where OCR is not able to reach a voluntary resolution of a complaint with a covered entity, involuntary enforcement will occur by the mechanisms established in the Department's existing regulations, such as those that apply to grants, contracts, or CMS programs, with OCR coordinating with the relevant funding component(s) of HHS. In those instances, the due process available under the applicable regulations will be available to covered entities. For example, 45 CFR 75.374 provides for opportunities for grantees to object, obtain hearings, and seek appeals when the Department or a component take a remedy for grantee non-compliance. Consistent with this approach, the language of § 88.7(a) is finalized with changes to clarify that the Director of OCR is authorized to pursue voluntary resolutions of complaints, and that remedial action beyond that will occur through coordination of OCR with funding components, consistent with applicable laws and regulations.

Comment: The Department received a comment stating that the proposed penalties violate the Spending Clause of the Constitution because, for Congress to place a condition on receipt of Federal funds by a State, the condition placed on the State must be unambiguous, and the amount in question cannot be so great that it can be considered coercive to the State's acceptance of the condition.

Response: The Department disagrees. The substantive requirements of laws enforced by this rule were set forth by Congress, and the Department is not aware of any successful Spending Clause challenge to such laws, even though some of those laws have existed for decades. The Department believes the conditions and requirements imposed on the States by the Federal conscience and anti-discrimination laws are unambiguous, and that these rules, in mirroring those requirements, are similarly clear. The Department has provided a clear description of entities to which each such statute applies, and of what is required of each entity in § 88.3 of this rule and elsewhere. Only after a violation has been found should the question of the appropriate remedy available under the law be answered.

It is the consistent policy of the Federal government to presume that statutes passed by Congress and signed by the President are constitutional. Funding remedies in cases of violations under this rule will be applied consistently with the Constitution and relevant case law. The Department's decision to finalize this section to make use of existing remedial mechanisms under longstanding HHS regulations applicable to certain funding instruments, with OCR coordinating with HHS funding components, will also ensure that remedies imposed will be consistent with any constitutional concerns.

Comment: The Department received a comment stating that referral to the Department of Justice for additional enforcement is not provided for in any of the Federal conscience and anti-discrimination laws.

Response: The Department of Justice acts as the Department's representative in court, and the Department routinely refers matters that require litigation on its behalf, or on behalf of the United States, to the Department of Justice including laws enforced by OCR. Furthermore, entities that make assurances or certifications of compliance under § 88.4, or that make other statements or productions to the Department under this part, do so under penalty of 18 U.S.C. 1001 (prohibiting materially false statements regarding an agency matter), violations of which may warrant referral to the Department of Justice. Additionally, the Department of Justice would be the appropriate party to receive referrals of potential violations of 42 U.S.C. 300a–8 which imposes criminal penalties on any officer or employee of the United States, or of any entity that administers federally funded programs (including States), and on any person receiving Federal financial assistance, who coerces or endeavors to coerce any person to undergo an abortion or sterilization procedure by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance. As a result, the Department finalizes the rule by amending § 88.7(i) (renumbered as § 88.7(h)) to clarify that possible appropriate referrals to the Department of Justice include potential violations of 42 U.S.C. 300a–8 and 18 U.S.C. 1001.

Comment: The Department received comments stating that health care entities should not be subject to the mechanisms in § 88.7 unless a discriminated-against employee had provided prior notice to the entity of the employee's religious beliefs or moral convictions.

Response: While the Department encourages employers and employees to openly discuss religious and moral convictions that may impact which services or tasks the employer may ask of employees, where Federal conscience and anti-discrimination laws do not require prior notice of religious beliefs or moral convictions, neither does this rule. In other situations involving religious accommodations, the Supreme Court has held that notice is not required.[138] Nevertheless, during complaint investigations and compliance reviews, the Department takes into consideration facts such as whether the covered entity knew or should have known about the objection.

Comment: The Department received a comment stating that imposing the penalties described in § 88.7(j)(3) (renumbered as § 88.7(i)(3)) on the basis of a ''threatened failure'' to comport with the Federal conscience and anti-discrimination laws is excessive.

Response: The Department agrees and is removing the phrase ''threatened failure'' from § 88.7(j)(3) (renumbered as § 88.7(i)(3)).

Comment: The Department received a comment stating that § 88.7 threatens all

[137] 45 CFR 160.308.

[138] *See, e.g., EEOC* v. *Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 2033 (2015) (stating that importation of a notice requirement would ''add words to the law'' and that a prior request for accommodation ''may make it easier to infer motive, but is not a necessary condition of liability.'').

funding streams for any violation of the Federal conscience and anti-discrimination laws.

Response: The Department disagrees. The only funding streams threatened by a violation of the Federal conscience and anti-discrimination laws are the funding streams that such statutes directly implicate. The Department cannot terminate funding for violation of a Federal conscience or anti-discrimination law unless Congress has applied that law to that funding. Section 88.7 is intended to provide a general description of the range of possible enforcement mechanisms available to the Department, not an exhaustive list of actions to be taken for each violation or prescribed amounts. Termination of funding as a possible remedy is a necessary corollary of Congressional requirements that certain funding not be provided to entities that engage in impermissible discrimination. Nevertheless, OCR commonly investigates complaints under civil rights laws that permit termination of funding on a finding of a violation, and yet OCR only rarely imposes termination of funding as a penalty for such violations. For example, under HIPAA, civil monetary penalties are not uncommon, although they still represent the minority of resolutions to cases where a violation was found to the satisfaction of the Department. In civil rights cases, complaint investigations in which OCR finds a violation are usually resolved by corrective action. What specific remedy is appropriate in the case of a particular violation depends on the facts and circumstances, and OCR does not prejudge those facts in this rule to suggest termination of funding will be either a common or an uncommon outcome. The Department simply observes that, just because the rule provides for termination of funding as a possible corrective action, does not mean that funding, either in whole or in part, will be terminated in all or even most cases. It would be premature and contrary to the history of OCR enforcement to deem this rule as a requirement that OCR terminate all, or even some, funding of all entities found to have committed a violation.

Summary of Regulatory Changes: For the reasons described in the proposed rule [139] and above, and considering the comments received, the Department finalizes § 88.7 by making the changes discussed above, which include clarifying that OCR will serve a coordinating role with other Department components when remedial actions are pursued, and such remedies will be pursued under regulations applicable to relevant funding instruments, rather than under an independent enforcement framework set forth in this rule as had been proposed. Consistent with changes made to the definition of ''discrimination'' regarding the applicability of disparate impact analysis, the Department deletes the phrase ''to overcome the effects of violations of Federal conscience and anti-discrimination laws and this part'' from § 88.7(a)(8). The Department deletes the phrase ''from time to time'' from § 88.7(c) and, in place of the sentence ''OCR may conduct these reviews in the absence of a complaint,'' adds the sentence ''OCR may initiate a compliance review of an entity subject to this part based on information from a complaint or other source that causes OCR to suspect non-compliance by such entity with this part or the laws implemented by this part.'' The Department also adds certain criminal statutes as possible bases of referrals to the Department of Justice under § 88.7(h); and removes the phrase ''threatened failure'' from § 88.7(j)(3) of the proposed rule (renumbered as § 88.7(i)(3) in this final rule). The Department also makes a technical correction, in order to maintain consistency of terminology, to replace the phrase ''cash payments'' with ''Federal financial assistance'' in § 88.7(j)(3)(i) of the proposed rule (renumbered § 88.7(i)(3)(i) in this final rule); makes technical changes to § 88.7(a); adds reference to coordination with the Department's Office of General Counsel to § 88.7(a)(6) and (h); makes a stylistic change to § 88.7(d), including the deletion of ''health care,'' ''associated,'' ''the,'' and ''but not limited to;'' removes proposed § 88.7(e), which discussed destruction of evidence; makes an edit for clarity and readability to relocate the phrase ''in whole or in part'' within paragraph (i)(3)(v); for greater accuracy replaces ''created by Federal law'' with ''under Federal law or this part'' in paragraph (i)(3)(vi); and inserts a new § 88.7(j) to specifically address handling of noncompliance with assurances and certifications, as discussed above.

Relationship to Other Laws § 88.8

This section would clarify the relationship between this part and other Federal, State, and local laws that protect religious freedom and moral convictions. In the proposed rule, the preamble for this section acknowledged that many State laws provide additional conscience protections for providers who have objections to abortion, fertility treatments, sterilization, assisted suicide, and euthanasia, among others. The Department proposed to uphold the maximum protection for the rights of conscience and the broadest prohibition on discrimination provided by Federal, State, or local law, as consistent with the Constitution. Where a State or local law provides as much or greater protection than Federal law for religious freedom and moral convictions, the Department proposed not to construe Federal law to preempt or impair the application of that law, unless expressly provided.

The Department noted that the proposed rule would not relieve OCR of its obligation to enforce other civil rights authorities, such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. The Department affirmed that OCR would enforce all civil rights laws consistent with the Constitution and the statutory language. The Department received comments on this section.

Comment: The Department received comments stating that the proposed rule conflicted with other Federal laws, such as Title X of the Public Health Service Act, that were raised in comments related to other provisions of the proposed rule.

Response: Issues of potential statutory conflict have already been raised by other comments and answered in responses set forth above, so they are not repeated here.

Comment: The Department received comments stating that the proposed rule violates 42 U.S.C. 18114, a section of the ACA that states that, notwithstanding any other provision of ACA, the Secretary shall not promulgate any regulation that creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care, impedes timely access to health care services, interferes with communications regarding a full range of treatment options between the patient and the provider, restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions, violates the principles of informed consent and the ethical standards of health care professionals, or limits the availability of health care treatment for the full duration of a patient's medical needs. Such comments argued that the proposed rule would violate this section by permitting providers to observe their consciences when responding to a patient's request for a particular medical

[139] 83 FR 3880, 3898–3899 (stating the reasons for the proposed § 88.7, except for the modifications adopted herein).

service or treatment, or when determining whether or not to refer for a particular medical service or treatment, instead of requiring providers to comply with such requests by patients.

Response: The Department disagrees. ACA section 1554, 42 U.S.C. 18114, in no way negates the Federal conscience and anti-discrimination laws enforced by this rule. First, section 1554 is limited to regulations promulgated under the ACA. Only a minority of the laws implemented by this rule are set forth in the ACA—most, including for example the Church Amendments, the Coats-Snowe Amendments, and the Weldon Amendment, are not part of the ACA, and therefore regulations implementing those statutes are not affected by section 1554.

Second, it is a basic principle that Congress ''does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'' *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). It is implausible that Congress intended section 1554 to impliedly repeal Federal conscience protections when section 1554 contains no reference to conscience whatsoever—and when, at the same time and in the same legislation, Congress added several new conscience provisions (*e.g.,* ACA sections 1303(b)(1)(A) and (b)(4), 1553), as well as a provision that nothing in the ACA shall be construed to have any effect on Federal laws regarding conscience protection; willingness or refusal to provide abortion; and discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion (*e.g.,* ACA section 1303(c)(2)).

Third, ''it is a commonplace of statutory construction that the specific governs the general,'' *Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992). Each Federal conscience and anti-discrimination law enforced by this rule is more specific to each set of circumstances than is section 1554, so that, to the extent there could be a potential conflict between the statutes, the more specific Federal conscience and anti-discrimination laws require that section 1554 not be interpreted to supersede them. For example, to the extent this rule enforces specific provisions of the ACA, such as ACA sections 1303(b)(1)(A) and (b)(4) and 1553, the rule enforces those laws according to their own text. The Department disagrees with the commenter's implication that, in ACA section 1554, 42 U.S.C. 18114, Congress intended to prohibit the enforcement of ACA sections 1303(b)(1)(A) and (b)(4) and 1553 as written. Generally, one part of a statute should not be interpreted to negate many other parts of the same statute, because that would render those parts of the statute meaningless.

Fourth, even assuming that section 1554 applies, it must be construed in harmony with the ACA conscience provisions, as well as the other Federal conscience protections, especially in light of section 1303(c)(2) that nothing in the ACA shall be construed to have any effect on Federal laws regarding conscience protection: There is a presumption that Congress does not silently repeal its own statutes, but it intends multiple statutes to be read without conflict. And this is the manner in which the Department interprets section 1554.

Fifth, again, even assuming that section 1554 applies, this Final Rule does not ''create[ ] any unreasonable barriers to the ability of individuals to obtain appropriate medical care.'' The protections enforced by this rule are duly enacted laws, passed by Congress and signed by the President. Such protections are, by definition, reasonable under 42 U.S.C. 18114. Further, by removing or reducing barriers that discourage health care providers from remaining in the health care industry, this rule promotes diversity and full participation of providers in health care generally and in HHS-funded programs in particular, and enhances the ability of individuals to obtain appropriate medical care. As for the compliance with 42 U.S.C. 18114's provisions concerning timely access to health care services or for full duration of a period of medical need, this rule does not limit a health care provider's ability to provide timely care and appropriate care, and for the reasons just discussed, should result in a greater number of providers and thus more timely and complete care overall. Additionally, as discussed in response to a previous comment above, the Emergency Medical Treatment and Labor Act (EMTALA) would not be displaced by the rule, and requires provision of treatment in certain emergency situations and facilities. As for 42 U.S.C. 18114's provisions concerning informed consent and interference with communications and the ability for doctors and patients to communicate freely, the Department addressed similar concerns in response to several comments above and incorporates such responses here by reference. Moreover, nothing in this rule restricts the doctor-patient relationship or interferes with doctor-patient communications. The underlying statutes enforced by this rule apply, or do not apply, to communications between a patient and provider of their own force, and this final rule does not ''interfere'' in those communications merely by protecting conscience rights established by Congress.

Comment: The Department received comments alleging that the proposed rule conflicts with the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.,* or the Rehabilitation Act, 29 U.S.C. 701 *et seq.,* because health care providers may exercise their religious beliefs or moral convictions to refuse to treat patients with HIV, or may decline to provide an abortion to a woman with a life-threatening condition.

Response: The Department is unaware of any religious or ethical belief systems that prohibit treatment of persons on the basis of their HIV status. Additionally, the Department disagrees that there is a conflict between the requirements of this rule and the Americans with Disabilities Act or the Rehabilitation Act under the hypotheticals presented. No regulation can, of its own force, supersede statutes enacted by Congress unless such statute is superseded or limited by another act of Congress. This rule merely provides the Department with the means to adequately enforce the Federal conscience and anti-discrimination laws to the extent permissible under the laws of the United States and the Constitution. *See Maher* v. *Roe,* 432 U.S. 464 (1977) (holding that government may favor childbirth over abortion through public funding); *Harris* v. *McRae,* 448 U.S. 917 (1980) (upholding laws limiting Federal funding of abortions).

Comment: The Department received a comment alleging that the proposed rule conflicts with international treaties, such as the International Covenant on Civil and Political Rights (''ICCPR''), which includes a ''right to health,'' and the International Covenant on Economic, Social and Cultural Rights (''ICESCR''), which describes four components of the right to health as availability, accessibility, acceptability and quality.

Response: The Department disagrees that the proposed rule conflicts with the ICCPR. The ICCPR does not include a ''right to health'' as described by the commenter. Instead, the ICCPR includes ''public safety, order, health, or morals'' as a permitted limitation on certain fundamental rights, such as free speech

and religious liberty.[140] When the Senate ratified the ICCPR, however, it did so subject to a declaration ''[t]hat it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.'' [141] Additionally, the Senate ratified the ICCPR with the understanding that the ICCPR is not self-executing.[142]

The Department also disagrees that the proposed rule conflicts with the ICESCR. First, the description of the ICESCR provided by the commenter is incorrect. The ICESCR simply requires that ''States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'' [143] Additionally, the United States has not ratified the ICESCR; thus, it is not binding. Nevertheless, because the Department believes, as described elsewhere in this preamble, that this rule will increase access to and quality of health care in America, this rule furthers the goals of the ICESCR.

Comment: The Department received a comment stating that the proposed rule violated the Eighth Amendment to the U.S. Constitution because the proposed rule would reduce access to care in prisons.

Response: The Department disagrees. First, as noted above, the Department believes that this rule will result in greater access to health care or greater options from a wider and more diverse pool of medical professionals. Additionally, the finalized definition of ''discriminate or discrimination'' ensures that a facility that must respect conscience can use alternative staff to accommodate an objector without violating this rule.

Comment: The Department received comments stating that the proposed rule could harm efforts to assist persons with substance use disorder because a health care provider may hold a religious or moral conviction that drug use should be treated as a moral or criminal matter instead of a medical matter.

Response: This rule does not conflict with any Federal statutes that would require the treatment of persons suffering from substance use disorder, because no regulation can, of its own force, supersede statutes enacted by Congress. This rule merely provides the Department with the means to adequately enforce the Federal conscience and anti-discrimination laws to the extent permissible under the laws of the United States and the Constitution. The Department is unaware of any faith community that holds the views identified by the commenter. To the contrary, the Department's experience reveals that many members of the faith community are actively involved and voluntarily play an important role in efforts to help address the opioid crisis and other substance use disorders.

Comment: The Department received comments stating that the proposed rule would violate the Equal Protection Clause of the Constitution by permitting discrimination against women seeking abortion.

Response: The Department disagrees. Nothing in this rule permits the Federal government to discriminate against a person on the basis of such person's membership in a suspect class. Neither the equal protection doctrine nor any other constitutional doctrine negates any of the Federal conscience and anti-discrimination laws pertaining to abortion that this rule enforces. On the contrary, the Supreme Court has upheld laws limiting Federal funding of abortions, even of those deemed to be medically necessary, against equal protection challenges. *See Harris* v. *McRae,* 448 U.S. 917 (1980) (upholding the Hyde Amendment against a challenge under the Equal Protection Clause because the Hyde Amendment is rationally related to the legitimate governmental interest in preserving the life of the unborn); *Maher* v. *Roe,* 432 U.S. 464 (1977) (holding that government may legitimately favor childbirth over abortion through public funding); *Rust* v. *Sullivan,* 500 U.S. 173 (1991) (same). *Roe* v. *Wade* and *Doe* v. *Bolton* both explicitly affirmed the appropriateness of conscience protections,[144] and, therefore, the scope of rights defined by either case cannot be read to conflict with conscience protections relating to abortion. This rule, additionally, furthers the legitimate governmental interest in ensuring a large and diverse pool of health care providers by removing obstacles to persons who are interested in serving as health care providers but might be unwilling to do so for fear of being coerced to violate their religious beliefs or moral convictions.

Comment: The Department received comments stating the proposed rule would violate the Establishment Clause by providing for an affirmative accommodation for religious beliefs that burden a third party.

Response: The Department disagrees that religious accommodations such as those provided by Congress and enforced by this rule violate the Establishment Clause. Congress began enacting laws such as the Church Amendments in 1973, and none of them have been invalidated under the Establishment Clause. As the Supreme Court recognized in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos,* ''the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause.'' 483 U.S. 327, 334 (1987) (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144–45 (1987)). As one commenter noted, in *Burwell* v. *Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2781 (2014), the Supreme Court held that the Department's regulation mandating group health plans to cover contraceptives violated the Religious Freedom Restoration Act by failing to provide an exemption for Hobby Lobby to exercise its sincerely held religious beliefs. The Supreme Court also observed that any burden on third parties could be addressed in other ways, including through the establishment of a new governmental program if necessary. The Court held that Hobby Lobby itself did not have to bear a religious burden merely because its religious accommodation may burden a third party.

Furthermore, this rule merely provides for the enforcement of the Federal conscience and anti-discrimination laws as Congress enacted them. These protections are limited to particular programs, particular governmental involvement, and particular funding streams, as Congress determined necessary to ensure that conscience rights are respected and that

[140] *See, e.g.,* International Covenant on Civil and Political Rights arts. 18–19, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

[141] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 23 (102d Sess. 1992)

[142] *Id.*

[143] International Covenant on Economic, Cultural and Social Rights art. 12, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3. (The ICECSR states that the ''steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.'' *Id.)*

[144] 410 U.S. at 143–44; 410 U.S. at 197–98.

health care entities with moral or religious objections to certain medical services or certain aspects of health service programs or research activities are not driven from the health care industry.

Comment: The Department received comments stating that the proposed rule will conflict with various State laws and medical standards.

Response: This rule does not establish new Federal law, but provides for the enforcement of laws enacted by Congress. To the extent State or local laws or standards conflict with the Federal laws that are the subject of this rule, the Federal conscience and antidiscrimination laws preempt such laws and standards with respect to funded entities and activities, in accordance with the terms of such Federal laws. With respect to States, States can decline to accept Federal funds that are conditioned on respecting Federal conscience rights and protections.

Summary of Regulatory Changes: For the reasons described in the proposed rule [145] and above, and considering the comments received, the Department finalizes § 88.8 without change, beyond global edits to the rule as a whole.

Rule of Construction § 88.9

This section proposed that the protections for religious freedom and moral conviction for which enforcement mechanisms are provided by this part would be construed broadly and to the maximum extent permitted by law and the Constitution. The Department received comments on this section, including comments in general support of the proposed section.

Comment: The Department received a comment stating that § 88.9 could be more clearly stated as follows: ''This part shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the Constitution and the terms of the Federal conscience protection and associated anti-discrimination statutes.''

Response: The Department agrees that this proposed language is clearer and is modifying § 88.9 to so read, with some stylistic changes to the proposed text, characterizing the Federal laws in question as ''Federal conscience and anti-discrimination laws.''

Summary of Regulatory Changes: For the reasons described in the proposed rule [146] and above, and considering the comments received, the Department finalizes § 88.9 by rephrasing it to add clarity so that it now says, ''This part shall be construed in favor of a broad protection of the free exercise of religious beliefs and of moral convictions, to the maximum extent permitted by the Constitution and the terms of the Federal conscience protection and associated anti-discrimination statutes.''

Severability § 88.10

In § 88.10, the Department proposed a severability provision that would govern the Department's interpretation and implementation of 45 CFR part 88 if any section of part 88 should be held invalid or unenforceable, either facially or as applied. In the event this occurs, the Department proposed that the provision in question be construed in a manner that gives maximum extent to the force of the provision as permitted by law. For instance, a provision held to be unenforceable as applied to a particular circumstance should be construed so as to continue the application of the provision to dissimilar circumstances. Proposed § 88.10 would provide that if the provision is held to be utterly invalid or unenforceable, the provision in question shall be severable from part 88, and the remainder of part 88 should remain in full force and effect to the maximum extent permitted by law. The Department received a comment on this section.

Comment: The Department received a comment stating that a severability clause is unnecessary because, following consideration of public comments to the proposed rule, the Department should be aware of any portions of the rule that are invalid or unenforceable.

Response: The Department does not agree that the severability clause is inappropriate. The Department considers all the provisions of this final rule as being legally supported, has fully considered all comments received, and has made appropriate modifications, additions, and deletions. Nevertheless, as a general matter, severability represents the Department's intention regarding whether the rule should go into effect if parts of it are held invalid or enjoined by a court. The Department deems it appropriate to maintain the severability clause as proposed, so that this rule will remain in place to the maximum extent allowable in the event of adverse court action. In addition, future additions to statutes enforced by this rule could render parts of the rule inapplicable, and it is the Department's intention that such changes will not invalidate parts of the rule that remain statutorily supported.

Summary of Regulatory Changes: For the reasons described in the proposed rule [147] and above, and considering the comments received, the Department finalizes § 88.10 without change.

Appendix A to Part 88—Notice of Rights Under Federal Conscience and Anti-Discrimination Laws

The Department received comments on appendix A to part 88, which were responded to above, with the comments to § 88.5.

Summary of Regulatory Changes: For the reasons described above, and considering the comments received, the Department finalizes appendix A to part 88 to provide a more accurate notice as to the protections provided by the Federal conscience and anti-discrimination laws. For instance, the Department replaces proposed text stating that the entity ''does not'' engage in certain acts with language stating that entity ''complies with'' laws prohibiting certain acts. The Department also modifies the notice text to say that ''You may have the right'' instead of ''You have the right,'' and replaces ''participate in'' with ''perform, assist in the performance of.'' The Department also makes stylistic changes to the heading and certain portions of the body text of the model notice in appendix A.

IV. Regulatory Impact Analysis

A. Introduction and Summary

The Department has examined the impacts of this final rule as required under Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017), the Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354, 5 U.S.C. 601–612), section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995, Pub. L. 104–04), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), the Assessment of Federal Regulation and Policies on Families (Pub. L. 105–277, sec. 654, 5 U.S.C. 601 (note)), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

This rule revises the regulation that allows OCR to accept and coordinate the handling of complaints alleging violations of the Weldon, Coats-Snowe and Church Amendments, three Federal

[145] 83 FR 3880, 3899.

[146] 83 FR 3880, 3899 (stating the reasons for the proposed § 88.9, except for the modifications adopted herein).

[147] 83 FR 3880, 3899.

laws that collectively protect conscience, prohibit coercion, and require nondiscrimination in certain programs and activities operated by recipients or sub-recipients or that are administered by the Secretary. Specifically, this rule:

(1) Expands the regulation's scope to encompass the full panoply of Federal health-related conscience protection and associated anti-discrimination laws that exist across the Department and that the Secretary has delegated to OCR to handle,

(2) Articulates the scope of enforcement mechanisms available to HHS to address noncompliance with Federal conscience and anti-discrimination laws, and

(3) Requires certain persons and entities covered by this rule to adhere to procedural and administrative requirements that aim to improve compliance with Federal conscience and anti-discrimination laws and to achieve parity with procedural and administrative requirements of other Federal civil rights authorities enforced by OCR.

TABLE 1—ACCOUNTING TABLE OF BENEFITS AND COSTS OF ALL CHANGES

	Present value over 5 years by discount rate (millions of 2016 dollars)		Annualized value over 5 years by discount rate (millions of 2016 dollars)	
	3 Percent	7 Percent	3 Percent	7 Percent
Benefits:				
Quantified Benefits	.....	.....	.....	.....
Non-quantified Benefits: Compliance with the law; protection of conscience rights, the free exercise of religion and moral convictions; more diverse and inclusive providers and health care professionals; improved provider-patient relationships that facilitate improved quality of care; equity, fairness, nondiscrimination; increased access to care.				
Costs:				
Quantified Costs	900.7	731.5	214.9	218.5
Non-quantified Costs: Compliance procedures (recordkeeping and compliance reporting) and seeking of alternative providers of certain objected-to medical services or procedures.				

Analysis of Economic Impacts: Executive Orders 12866 and 13563

HHS has examined the economic implications of this final rule as required by Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). The Department estimates that the benefits of this rule, although not always quantifiable or monetized, justify the burdens of the regulatory action.

B. Executive Order 12866

Section 6(3)(C) of Executive Order 12866 requires agencies to prepare a regulatory impact analysis (RIA) for major rules that are significant. Section 3(f) of Executive Order 12866 defines a regulatory action as significant if it is likely to result in a rule that meets one of four conditions: (1) Is economically significant, (2) creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency, (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of the recipients of these grants and programs, or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. A rule is likely to be economically significant where the agency estimates that it will (a) have an annual effect on the economy of $100 million or more in any one year, or (b) adversely and materially affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The Department has determined that this rule will have an annual effect on the economy of $100 million or more in one year and, thus, is economically significant. The rule also furthers a presidential priority of protecting conscience and religious freedom. Executive Order 13798, 82 FR 21675 (May 4, 2017).

C. Executive Order 13563

Executive Order 13563 supplements and reaffirms the principles of Executive Order 12866. Section 1(b) of Executive Order 13563 requires agencies to:

- ''propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs,''
- ''tailor its regulations to impose the least burden on society,''
- ''select . . . regulatory approaches that maximize net benefits,''
- ''[as] feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt,'' and
- ''identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior . . . or providing information upon which the public can make choices.''

Executive Order 13563 encourages agencies to promote innovation; avoid creating redundant, inconsistent, or overlapping requirements applicable to already highly regulated industries and sectors; and consider approaches that maintain flexibility and freedom of choice for the public. Finally, Executive Order 13563 requires that agencies use the best reasonably obtainable scientific, technical, and economic information available in evaluating the burdens and benefits of a regulatory action.

The Department considered these objectives and used the best reasonably obtainable technical and economic information to determine that this final rule creates net benefits, is tailored to impose the least burden on society, incentivizes the desired behavior, and maximizes flexibility. This impact analysis also strives to promote transparency in how the Department derived the estimates. To this end, this RIA notes the extent to which key uncertainties in the data and assumptions affect the Department's analytic conclusions.

1. Need for the Rule

(i) Problems That This Rule Seeks To Address

In developing regulatory actions, ''[e]ach agency shall identify the problem that it intends to address (including . . . the failures of private markets or public institutions . . .) as well as assess the significance of the problem.'' E.O. 12866, sec. 1(b)(1). In identifying the problem warranting agency regulatory action, ''[e]ach agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem . . . .'' E.O. 12866, sec. 1(b)(2).

This rule seeks to address two categories of problems: (1) Inadequate enforcement tools to address unlawful discrimination and coercion faced by protected persons, entities, or health care entities, and (2) lack of awareness, and, to the extent there is awareness, confusion, concerning Federal conscience protection obligations and associated anti-discrimination rights, of covered entities and individuals and organizations, respectively, leading to possible violations of law. The array of issues described in *supra* at part I.B (describing the final rule's regulatory history) fall into one or both of these categories.

The first category—inadequate enforcement tools to address unlawful discrimination and coercion—stems from inadequate to non-existent regulatory frameworks to enforce existing Federal conscience and anti-discrimination laws. The absence of adequate Federal governing frameworks to remedy discrimination may have undermined incentives for covered persons and entities to institute proactive measures to protect conscience, prohibit coercion, and promote nondiscrimination. Although some public comments argued that existing law is sufficient to protect conscience and religious freedom, the Department disagrees, given the mutually reinforcing deficiencies at the Federal level, which include:

- An inadequate, minimalistic regulatory scheme set forth in the Department's 2011 Rule that rescinded the comprehensive 2008 Rule, which addressed three of the 25 statutory provisions that are the subject of this rule. *See supra* at part I (describing existing and prior versions of the rule and identifying confusion about the scope and applicability of Federal conscience and anti-discrimination laws);
- An unduly narrow Departmental interpretation of the Weldon Amendment adopted by OCR in connection with the 2011 Rule that limited the scope of prohibited discrimination, contrary to the language that Congress passed, *see supra* at part I.B (addressing confusion caused by OCR sub-regulatory guidance); and
- A lack of strategic coordination across the Department to promote awareness of Federal protections for conscience and religious freedom in health care, and to address the enforcement of Federal conscience and anti-discrimination laws set forth in authorizing statutes of programs conducted or administered by Departmental components. *See supra* at part I.A (identifying additional Federal conscience and anti-discrimination laws).

The second category of problems—lack of awareness and, where there is awareness, confusion concerning Federal conscience protection obligations and associated anti-discrimination rights, of covered entities and individuals and entities, respectively—stems from inadequate information and understanding about such Federal law, leading to possible violations of law. Relevant situations where persons, entities, and health care entities with religious beliefs or moral convictions may be coerced or suffer discrimination include:

- Being required to perform, participate in, pay for, provide coverage for, counsel or refer for abortion, sterilization, euthanasia, or other health services;[148]
- participating in health professional training that pressures students, residents, fellows, etc., to perform, assist in the performance of, refer for, or counsel for, abortion or sterilization;
- being steered away from a career in obstetrics, family medicine, or geriatric medicine, when one has a religious or moral objection, as applicable, to abortion, sterilization, physician-assisted suicide or euthanasia;
- being asked to perform or assist in certain services within the scope of one's employment but contrary to one's religious beliefs or moral convictions.

Comments received in support of the proposed rule demonstrated that persons who are unlawfully coerced to violate their consciences, or otherwise discriminated against because they have acted in accord with their moral convictions or religious beliefs, may experience real harms that are significant and sometimes devastating psychologically, emotionally, and/or financially.[149] This can include loss of jobs, loss of promotion possibilities, ''blackballing'' in the medical community, denial of acceptance into or graduation from a medical school, denial of board certification, stigmatization, shunning by peers, and trauma and stress from forced violations of the Hippocratic Oath. Commenters shared anecdotes of the occurrence and nature of coercion, discriminatory conduct, or other actions potentially in violation of Federal conscience and anti-discrimination laws. Commenters also shared their assessment of the knowledge, or lack thereof, among the general public, health care field, health care insurance industry, and employment law field of the rights and obligations that this rule implements and enforces. Examples follow.

- Numerous commenters shared anecdotes of bias and animus in the health care sector against individuals with religious beliefs or moral convictions with respect to abortion.
- Employees shared that they experienced discrimination based on their objections to prescribing abortifacients or participating in abortion or assisted suicide.
- Commenters stated that many health care professionals' careers are jeopardized because entities are completely unaware or willfully dismissive of applicable Federal law that protects conscience, prohibits coercion, or requires nondiscrimination.
- Students, fellows, and residents shared being forced out of residency programs or fields of medicine because of their beliefs about abortion or contraception.
- Commenters shared that they considered avoiding obstetrics and gynecology programs for fear of discrimination and shared polling data, which the RIA's benefits section describes *infra* at part IV.C.4, documenting discrimination experienced by medical students on the basis of their religious beliefs or moral convictions.
- Commenters expressed concern that States are coercing persons and entities

[148] California, for example, sent a letter to seven insurance companies requiring insurers to include abortion coverage in plans used by persons who objected to such coverage. *See* Letter from California Department of Managed Health Care, *Re: Limitations or Exclusions of Abortion Services* (Aug. 22, 2014). The State of California estimates that at least 28,000 individuals subsequently lost their abortion-free health plans, and multiple churches have challenged California's policy in court. *See Foothill Church* v. *Rouillard,* 2:15–cv–02165–KJM–EFB, 2016 WL 3688422 (E.D. Calif. July 11, 2016); *Skyline Wesleyan Church* v. *California Department of Managed Health Care,* No. 3:16–cv–00501–H–DHB (S.D. Calif. 2016).

[149] *See. e.g.,* Compl. *Cenzon-DeCarlo* v. *Mount Sinai Hosp.,* No: 09–3120 (E.D.N.Y. Jul. 21, 2009) at 15 (''Being forced to assist in this abortion has caused Mrs. DeCarlo extreme emotional, psychological, and spiritual suffering.'') (dismissed on other grounds).

to violate their religious beliefs or moral convictions through laws mandating health coverage for abortion.

• One commenter noted that academic medical institutions are not self-policing compliance with, or educating students on, applicable Federal conscience and anti-discrimination laws.

• Commenters shared barriers to obtaining coverage by Medicare Advantage plans for care provided by RNHCIs.[150] Commenters shared that plans justified the denials of coverage and preauthorization requests because medical professionals did not provide the care (even though by definition, an RNHCI provides nonmedical care).

Some commenters have suggested that the thirty-four complaints that OCR received between November 2016 and January 2018 that allege coercion, violation of conscience, or discrimination do not necessitate this final rule.[151] These commenters misconstrue the reasons for this rule; the increase in complaints received by OCR is one of the many metrics used to demonstrate the importance of this rule. During FY 2018, the most recently completed fiscal year for which data are available, OCR received 343 complaints alleging conscience violations.[152] Some complaints raise issues that affect more than one aggrieved person, entity or health care entity; therefore, although one person may have filed the complaint, the complaint may represent the concerns and objections of all nurses at a hospital, multiple pregnancy care facilities or providers in a State, or entire populations (or subpopulations) of States or communities.

(ii) How the Rule Seeks To Address the Problems

This rule corrects those problems. First, the Department revises 45 CFR part 88 from a minimal regulatory scheme to one comparable to the regulatory schemes implementing other civil rights laws. Such schemes typically include a dozen provisions, addressing a range of conduct. These provisions typically restate the substantive requirements and obligations of the laws and often set forth procedural requirements (*e.g.,* assurances of compliance, recordkeeping of compliance, etc.) to advance compliance with substantive rights and obligations. In addition, the regulatory schemes outline the enforcement procedures to provide regulated entities notice of the enforcement tools available to HHS and the type of remedies HHS may seek. Part 88 in effect as a result of the 2011 Rule, by contrast, was only three sentences long and provided considerably less notice and clarity about the conduct prohibited under Federal law and the enforcement mechanisms available to HHS.

This rule confirms HHS will have the authority to initiate compliance reviews where it believes compliance issues have arisen, conduct investigations, resolve complaints, and supervise and coordinate appropriate action(s) with the relevant Department component(s) to assure compliance. Under this rule, certain persons and entities must maintain records regarding compliance with part 88; cooperate with OCR investigations, compliance reviews, interviews, or other parts of OCR's investigative process; and submit written assurances and certifications of compliance to the Department. These procedural and administrative requirements are similar to those in other civil rights regulations that promote compliance with, and enforcement of, the Federal civil rights laws that the regulations implement. Finally, by expanding the scope of part 88 to cover the 25 statutory conscience and anti-discrimination laws applicable to HHS that are the subject of this rule, the rule supports the Department's strategic coordination with respect to compliance with, and enforcement of, these laws across the Department, as well as providing one location that identifies all of the health care related conscience protections and associated anti-discrimination laws enforced by the Department so that regulated entities have clear knowledge of the applicable conscience requirements.

The investigative and enforcement processes set forth by the rule are vital because other avenues of relief are inadequate or unavailable. The Department solicited comment on whether alternate remedies, such as pursuing litigation, have been sufficient to address discrimination, coercion, or other treatment that the laws that are the subject of this rule prohibit. Many commenters stated that litigation was an inadequate option because several courts have declined to recognize a private right of action, such as under the Coats-Snowe and Church Amendments, and have concluded that persons must rely on OCR's administrative complaint process to secure relief.[153] Some commenters also viewed litigation as unviable given the high economic costs of litigation, which may be against well-funded States or medical providers.

Second, this rule promotes voluntary compliance with laws governing the ability of health care entities to act in accord with their legally protected religious beliefs or moral convictions by ensuring that health care entities are aware of, and understand, Federal conscience and anti-discrimination laws. The rule incentivizes entities to provide notice of rights and obligations under the rule by identifying the provision of notice as non-dispositive evidence of compliance that OCR will consider if an entity is subject to an OCR investigation or compliance review. Entities will be more likely to accommodate conscience and associated anti-discrimination rights if entities understand that they are legally obligated to do so. Entities will also be in a better position to accommodate these rights if they understand these rights are akin to other civil rights protecting people from discrimination on the basis of race, national origin, disability, etc.—rights for which entities already provide notice and are familiar with respecting.

In addition, as described *infra* at part IV.C.3.i, the Department anticipates that a subset of recipients that assure and certify compliance in accordance with § 88.4 will take organization-wide action, such as to update policies and procedures, implement staffing or scheduling practices that respect the exercise of conscience rights under Federal law, or take steps to disseminate the recipient's policies and procedures concerning these laws. Greater transparency of practices through open communication of recipient and sub-recipient policies ''should strengthen relationships between . . . entities and their . . . [workforce members].'' [154]

Protection of religious beliefs and moral convictions serves not only individual rights, but also society as a whole. Protections for conscience help ensure a society free from discrimination and more respectful of personal freedom and fundamental

[150] RNHCIs can participate in Medicare and Medicaid as long as they meet the requisite conditions of coverage and participation. See *supra* at part I.A (summarizing the history of statutory provisions regarding RNHCIs, among other provisions, which this rule implements and enforces). *See also https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/RNHCIs.html.*

[151] *See* 83 FR 3880, 3886 (proposed Jan. 26, 2018) (to be codified at 45 CFR pt. 88) (summarizing the history of OCR enforcement of conscience laws).

[152] Complaint data based on OCR's system of records as of December 20, 2018.

[153] *See, e.g., Vermont All. for Ethical Healthcare, Inc.* v. *Hoser,* 274 F. Supp. 3d 227, 240 (D. Vt. 2017); *Hellwege* v. *Tampa Family Health Centers,* 103 F. Supp. 3d 1303, 1311–12 (M.D. Fla. 2015); Order at 4, *National Institute of Family and Life Advocates, et al.* v. *Rauner,* No. 3:16–cv–50310 (N. D. Ill. July 19, 2017), ECF No. 65. *See also supra* at part II.A (describing the lack of private remedies).

[154] 73 FR 78074, 78074 (2008 Rule).

rights enshrined in the First Amendment and Federal law. The Department shares the anticipation of many commenters who reasoned that the rule will promote a culture of respect for rights of conscience and religious freedom in health care that is currently lacking. The boundaries of protection for conscience may be tested when protections for religious beliefs and moral convictions appear to impose a cost or compete with other public purposes.[155] However, as with other civil rights laws, it is in those cases where fidelity to the law becomes of paramount importance.

2. Affected Persons and Entities

The final rule affects (1) persons and entities already obligated to comply with the Weldon Amendment, Coats-Snowe Amendment, or Church Amendments (or a combination thereof) under the 2008 and 2011 Rules; and (2) persons and entities obligated to comply with at least one of the other Federal statutory provisions that this rule implements.

(i) Scope of Persons and Entities Covered by 45 CFR Part 88 in 2011 Rule

Depending on the operation and applicability of the underlying statutes, the 2011 Rule, *i.e.,* 45 CFR part 88 as currently in effect, extended, and continues to extend, broadly. As explained below, the diversity of entities estimated as covered is due to the applicability of the Church Amendments, which applies to non-governmental (as well as governmental) entities that operate ''any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary''; [156] or receive a grant, contract, loan, or loan guarantee under the Public Health Service (PHS) Act,[157] which contains thirty titles and authorizes dozens of programs, or under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), or receive an interest subsidy under the DD Act.[158]

(A) The Department

As a result of the 2011 Rule, 45 CFR part 88 applied, and still applies, to the Department because the Weldon and Coats-Snowe Amendments, as well as specific parts of the Church Amendments, apply to the Department.

The Weldon Amendment states that ''[n]one of the funds made available in [the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019] may be made available to a Federal agency or program . . . if such agency [or] program . . . subjects any institutional or individual health care entity to discrimination . . . .'' [159] The Department is a Federal agency that receives substantial funds made available in the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, which are the funds addressed in Weldon.[160] The Department must comply with the Weldon Amendment.

The Coats-Snowe Amendment states that ''[t]he Federal Government . . . may not subject any health care entity to discrimination on the [bases]'' listed in paragraphs (a)(1)–(3) of 42 U.S.C. 238n. The Department, as part of the Federal Government, must comply with the Coats-Snowe Amendment in its operations.

Paragraphs (d) and (c)(2) of the Church Amendments apply to certain programs administered by the Secretary. Paragraph (d) applies to all health service programs or research activities funded in whole or part under programs administered by the Secretary, regardless of the source of funding. Paragraph (c)(2) applies to entities that receive grants or contracts ''for biomedical or behavioral research under any program administered by the Secretary.'' [161] The requirements would, thus, apply to such programs or research activities conducted by, or funded by or through, the Department.

(B) State and Local Governments

As a result of the 2008 and 2011 Rules, 45 CFR part 88 applied, and will continue to apply, to all State and local governments that receive HHS Federal financial assistance by virtue of several statutory provisions. First, the Weldon Amendment applies to State and local governments that receive funds made available in the annual Labor, Health and Human Services, and Education Appropriations Act.[162] Second, the Coats-Snowe Amendment applies to State and local governments that receive Federal financial assistance, including Federal financial assistance from the Department (without restriction to any particular funding stream), ''includ[ing] governmental payments provided as reimbursement for carrying out health-related activities.'' [163] Third, several paragraphs of the Church Amendments apply to State and local governments. Paragraph (b) of the Church Amendments prohibits coercion by a ''public authority,'' and thereby includes States and local governments. Paragraphs (c) and (e) of the Church Amendments apply to State and local governments to the extent that such governments receive funds to implement programs authorized in the public laws cited in such paragraphs. Finally, paragraph (d) of the Church Amendments applies to a State or local government (or a component thereof) to the extent that such State or local government receives funding under any program administered by the Secretary.[164]

State and local governments (such as counties or cities) and instrumentalities of governments (such as State health and human services agencies) receive Federal financial assistance or Federal funds from the Department from a variety of financing streams as recipients or sub-recipients. Examples of programs and activities for which State and local governments (in some cases, not exclusively) receive Federal financial assistance or Federal funds from the Department may include Medicaid and the Children's Health Insurance Program; Title X programs, public health and prevention programs, HIV/AIDS and STD prevention and education, and substance abuse screening; biomedical and behavioral research at State institutions of higher education; services for older Americans; medical assistance to refugees; and adult protection services to combat elder abuse.

[155] *See* Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals,* 49 Ariz. St. L.J. 549, 550–51 (2017) (''[T]he growing acceptance of this 'public utility' model of medicine means in practice that extant Federal and State laws protecting conscience—most of which cover only a limited range of procedures and medical practitioners, lack meaningful enforcement mechanisms, and . . . are inadequate to the task of protecting the right to conscience[] . . .'' (citations omitted)).

[156] 42 U.S.C. 300a–7(d).

[157] 42 U.S.C. 300a–7(c).

[158] 42 U.S.C. 300a–7(e).

[159] *E.g.,* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115–245, Div. B, sec. 507(d), 132 Stat. 2981, 3118 (September 28, 2018).

[160] *Id.*

[161] 42 U.S.C. 300a–7(c)(2) and (d).

[162] *See, e.g.,* Public Law 115–245, Div. B, section 507(d), 132 Stat. 2981, 3118 (''None of the funds made available in [the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019] may be made available to a . . . State or local government[ ] if such . . . government . . . .'').

[163] 42 U.S.C. 238n(a), (c)(1).

[164] *Id.* section 300a–7(d) (''No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services . . . .'').

(C) Persons and Entities

As a result of the 2008 and 2011 Rules, 45 CFR part 88 applied, and still applies, to recipients and sub-recipients that operate ''any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary'' [165]; or receive a grant, contract, loan, or loan guarantee under the Public Health Service (PHS) Act [166] or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), or receive an interest subsidy under the DD Act.

Examples of recipients and sub-recipients may include:

- Health facilities, including hospitals, federally qualified health centers, community health centers, and mental health clinics;
- Health-related schools and other education entities that provide health professions training for medicine, oral health, behavioral health, geriatric care, nursing, etc.;
- Community-based organizations that provide substance abuse screening, HIV/AIDS prevention and treatment, and domestic violence screening;
- Title X-funded family planning clinics;
- Private non-profit and for-profit agencies that provide medical care to unaccompanied minors;
- Interdisciplinary university centers or public or nonprofit entities associated with universities that receive financial assistance to implement the DD Act [167]; and
- State Councils on Developmental Disabilities [168] and States' Protection and Advocacy Systems that receive funds to implement the DD Act.[169]

Several statutory provisions support this application. First, paragraphs (c)(1) and (2) of the Church Amendments apply to entities that receive a ''grant, contract, loan, or loan guarantee under the [PHS Act],'' or a ''grant or contract for biomedical or behavioral research.'' Second, paragraph (e) of the Church Amendments applies to entities that receive a ''grant, contract, loan, or loan guarantee, or interest subsidy'' under the PHS Act or the DD Act.[170] Third, paragraph (d) of the Church Amendments applies to ''any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services.'' [171] Paragraph (d) of the Church Amendment does not tie the funding source to a particular appropriation, instrument, or authorizing statute, nor does the receipt of funds under Church (d) automatically trigger coverage of all of an entity's operations.

(ii) Persons and Entities Obligated To Comply With Additional Federal Laws That This Rule Implements and Enforces

This rule only affects persons and entities obligated to comply with at least one of the Federal statutory provisions that this rule implements and enforces. There is substantial overlap between persons and entities currenty obligated to comply with 45 CFR part 88, as based on the 2011 Rule and persons and entities subject to at least one of the additional Federal laws that this final rule enforces. This overlap occurs because such persons and entities largely were, and continue to be, subject to 45 CFR part 88 by virtue of the Church Amendments, but also the Weldon Amendment and the Coats-Snowe Amendment, as explained above. Because of this substantial overlap, the Department estimated in the proposed rule that OCR's authority to enforce the following statutory provisions would not add any new persons and entities to the coverage of this rule:

- Provisions protecting health care entities and individuals from discrimination who object to furthering or participating in abortion under Medicare Advantage, *e.g.* Public Law 115–245, Div. B, Tit. II, sec. 209, 132 Stat. 2981, 3090 (2018);
- Provisions of the Affordable Care Act related to assisted suicide (42 U.S.C. 18113), the ACA individual mandate (26 U.S.C. 5000A(d)(2)), and other matters of conscience (42 U.S.C. 18023(c)(2)(A)(i)–(iii), (b)(1)(A) & (b)(4));
- Provisions regarding conscience protections for objections to counseling and referral for certain services in Medicaid or Medicare Advantage (42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B));
- Provisions regarding conscience protections related to the performance of advanced directives (42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406);
- Provisions exempting individuals from compulsory health care or services generally (42 U.S.C. 1396f & 5106i(a)(1)) and under specific programs for hearing screening (42 U.S.C. 280g–1(d)), occupational illness testing (29 U.S.C. 669(a)(5)), vaccination (42 U.S.C. 1396s(c)(2)(B)(ii)), and mental health treatment (42 U.S.C. 290bb–36(f)); and
- Protections for religious nonmedical health care relating to health facility review (42 U.S.C. 1320a–1), peer review (42 U.S.C. 1320c–11), certain health standards (42 U.S.C. 1396a(a)(9)(A)), medical evaluation (42 U.S.C. 1396a(a)(31)), medical licensing review (42 U.S.C. 1396a(a)(33)), and utilization review plan requirements (42 U.S.C. 1396b(i)(4)), and by protecting the exercise of religious nonmedical health care in the Elder Justice Block Grant Program (42 U.S.C. 1397j–1(b)) and in the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106i(a)(2)).

In the proposed rule, the Department estimated that the OCR enforcement of the following Federal statutory provisions could add new persons and entities to the coverage of 45 CFR part 88:

- Global Health Programs for HIV/AIDS Prevention, Treatment, or Care (22 U.S.C. 7631(d)), and
- The Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f), *e.g.,* Consolidated Appropriations Act, 2019, Public Law 116–6, Div. F, sec. 7018.

However, the proposed rule explained that because paragraph (d) of the Church Amendments does not require that the funding for the health service program or research activity be appropriated to HHS, but only that it be ''funded in whole or part under a program administered by the [HHS] Secretary,'' funding appropriated to other Federal Departments, but awarded by HHS in its administration of certain global health programs would be covered by paragraph (d) of the Church Amendments. Consequently, HHS's

[165] 42 U.S.C. 300a–7(d).

[166] The PHS Act contains thirty titles and authorizes dozens of programs.

[167] *E.g., https://www.acl.gov/node/466.*

[168] *E.g., https://www.acl.gov/node/110.https://www.acl.gov/sites/default/files/about-acl/2017-12/DDC-2017.pdf.*

[169] *E.g., https://www.acl.gov/sites/default/files/about-acl/2017-06/PADD-2017.pdf.*

[170] *Id.* 300a–7(c)(1)(B) (''No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act . . . .''); 300a–7(e) (''No entity which receives . . . any grant, contract, loan, [or] loan guarantee . . . under the Public Health Service Act . . . or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 may . . . .''). In addition to the PHS Act, paragraphs (c)(1) and (e) of the Church Amendments apply to entities that receive funding under the Community Mental Health Centers Act, 42 U.S.C. 2689 *et seq.* Paragraph (c)(1) of the Church Amendments additionally applies to entities that receive funding under the Developmental Disabilities Services and Facilities Construction Act, 42 U.S.C. 6000 *et seq.* Congress repealed both of these laws. *See* Omnibus Reconciliation Act of 1981, Public Law 97–35, Title IX, sec. 902(e)(2)(B), 95 Stat. 560 (1981); Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106–402, Title IV, sec. 401(a), 114 Stat. 1737 (2000). Thus, there are no entities receiving funds under programs authorized by these statutes to consider in this RIA.

[171] *Id.* section 300a–7(d) (''No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services . . . .'').

implementation of 22 U.S.C. 2151b(f) and 7631(d) may not expand the scope of persons and entities covered by this part.

(iii) Methodology

The Department quantitatively estimated those persons and entities covered by the final rule by relying primarily on the latest data available from the U.S. Census Bureau's Statistics of U.S. Businesses [172] supplemented with other sources. The Department invited public comment on the proposed rule's methodology and solicited ideas on whether there are other methodologies that the Department could consider to refine the scope of persons and entities affected by this rule. The Department received one comment suggesting that the Department's methodology was flawed for failing to include an estimate of the number of consumers of health care affected, *i.e.,* patients, and thus did not consider consumers of health care in the list of persons and entities shown *infra* at Table 2. The purpose of Table 2 is to identify *regulated entities,* not consumers of health care. An analysis of this rule's impact on persons, entities, and health care entities is included in the rule's analysis of benefits, *infra* at part IV.C.4. The final rule's methods for quantifying the persons and entities impacted are the same methods from the proposed rule, which the Department determined was the most reasonable and reliable approach.[173]

The U.S. Census Bureau's Statistics of U.S. Businesses is based on the North American Industry Classification System (NAICS).[174] The NAICS classifies all economic activity into 20 sectors and breaks that information down into sub-sectors and industries.[175] Essentially, the NAICS groups physical business establishments together based on how similar the locations' processes are for producing goods or services.[176] The NAICS provides information on how many singular physical locations exist for a particular business or industry (called an ''establishment''),[177] how many of those establishments are under common ownership or control of a business organization or entity (called a ''firm''),[178] and the number of people who work in a particular business or industry, among other types of information. For instance, a hospital system that has common ownership and control over multiple hospital facilities is a firm, and each hospital facility is an establishment.

For the vast majority of the recipient and sub-recipient types, the Department assumed that only a portion of the industry captured in the Statistics of U.S. Businesses receives Federal funds to trigger coverage by this rule (*e.g.,* ''Federal financial assistance . . . from the Department or a component of the Department, or who otherwise receives Federal funds directly from the Department or a component of the Department''). For instance, not all physician offices receive FFA or otherwise receive Federal funds as a recipient or sub-recipient. In fact, about 68.9 percent of physician offices accepted new Medicaid patients based on 2013 data from the National Electronic Health Records Survey.[179] Approximately 83.7 percent of physicians accepted new Medicare patients based on the same data.[180] Because OCR interprets the 2011 Rule to apply to physicians receiving reimbursement for Medicare Part B, which is a ''health service program . . . funded in whole or in part under a program administered by the Secretary of Health and Human Services'', the Department assumed that the lower of these two percentages (69 percent) represents the lower-bound of physicians nationwide subject to the 2011 Rule. In the absence of evidence with which to generate a refined upper-bound estimate, the Department assumed that the 2011 Rule covers all physicians nationwide as the upper-bound.

The Department used this same percentage range (69 to 100 percent) in estimating the coverage for other health care industry sector types, such as hospitals and various outpatient care facilities. For the social services and education industries, which generally have principal purposes other than health and patient care, the Department adopted ranges more appropriate for those industries. For the social services industries, the Department adopted a range with 25 percent as the lower-bound and 100 percent as the upper-bound to cover 62.5 percent of the industry on average. In its notice of proposed rulemaking, the Department sought comment on this methodology, but received no comments providing a superior method of generating these estimates.

The Department assumes some portion of the social service industry will be covered by the rule, given the scope of the 2011 Rule and thereby this rule. For instance, entities that carry out social services programs and activities may do so in the context of health service programs or research activities funded in whole or in part under programs administered by the Secretary, or may receive funding through programs administered by the Secretary, as well as by grants or other mechanisms under the PHS Act [181] or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 within the scope of the Church Amendment's application.

To estimate the number of local governments and educational institutions, the Department relied on data from other U.S. Census Bureau statistical programs or available award data available through the HHS Tracking Accountability in Government Grants System (TAGGS).[182] For instance, in estimating the number of counties nationwide, the Department relied on the U.S. Census Bureau's 2010 Census Geographic Entity Tallies by State and Type to identify the total counties and equivalent areas for the U.S., Puerto Rico, the U.S. Territories, and the Island Areas.[183]

As another example, the Department relied on data from TAGGS to derive a lower-bound percentage of colleges and universities that are recipients. (The upper-bound assumes all educational institutions industry-wide are recipients.) Although most colleges and universities receive Federal financial assistance from the U.S. Department of Education, not all universities are recipients of HHS funds; thus, the Department adopted a lower-bound estimate to reflect that assumption.

Using the ''Advanced Search'' function in TAGGS, HHS identified all awards to Junior Colleges, Colleges, and

[172] *https://www.census.gov/data/datasets/2015/econ/susb/2015-susb.html.* The Department relied on the data file titled ''U.S. & State, NAICS, detailed employment sizes (U.S., 6-digit and States, NAICS sectors).'' The latest data available is from 2015 that the Bureau made available in September of 2017, and this data relied on the 2012 NAICS codes, *id.,* which are described at *https://www.census.gov/eos/www/naics/2012NAICS/2012_Definition_File.pdf.*

[173] *See* 83 FR 3880, 3907 (describing various sources of data considered and reasons for rejecting other approaches).

[174] *https://www.census.gov/programs-surveys/susb/technical-documentation/methodology.html.*

[175] FAQ 5, *https://www.census.gov/eos/www/naics/faqs/faqs.html#q5.*

[176] FAQ 1, *https://www.census.gov/eos/www/naics/faqs/faqs.html#q1.*

[177] *https://www.census.gov/eos/www/naics/faqs/faqs.html#q2.*

[178] *https://www.census.gov/glossary/#term_Firm.*

[179] Esther Hing, *et al.,* Nat'l Ctr. For Health Statistics, Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Servs., Acceptance of New Patients with Public and Private Insurance by Office-Based Physicians: United States, 2013, Data Brief No. 195, 1 (Mar. 2015).

[180] *Id.*

[181] The PHS Act contains thirty titles and authorizes dozens of programs.

[182] *http://taggs.hhs.gov* (last visited Aug. 24, 2017).

[183] *https://www.census.gov/geo/maps-data/data/tallies/all_tallies.html.*

Universities for FY 2016 and de-duplicated the results to obtain a singular list of unique awardees from the Department, which totaled 615. Because these awardees included satellite campuses of college or university systems, the total awardee number was akin to the number of ''establishments'' rather than ''firms'' as those terms are used in the U.S. Census Bureau's Statistics of U.S. Businesses. Similar to how an ''establishment'' is a location of a ''firm'' that has common ownership and control over at least one establishment, a satellite campus is one location of a university system with common ownership and control over multiple campus locations.

To derive an estimate of educational institutions at the ''firm'' level, the Department computed the ratio between firms and establishments from the U.S. Census Bureau's Statistics of U.S. Businesses.[184] This ratio is 51.32 percent (2,457 firms/4,788 establishments). The Department applied that ratio to the total number of Junior Colleges, Colleges, and Universities that received HHS funding as ''establishments'' (0.5132 × 615 awardee establishments) to get an estimate of 316 firms. Despite this method's potential complexity, the Department found it the most reasonable method for estimating the lower-bound number of colleges and universities that are Department recipients.

(iv) Quantitative Estimate of Persons and Entities Covered by This Rule

Table 2 lists each estimated type of recipient and the estimated number of recipients that this final rule covers. Because there is uncertainty as to the universe of actual persons and entities covered, Table 2 captures this uncertainty by reflecting estimated recipients as a range with a lower and an upper-bound. The footnotes detail the assumptions and calculations for each line of the table and assume coverage for 69–100 percent of the industry unless otherwise noted. The Department has made a technical correction to Table 2 to include the number of offices of miscellaneous health practitioners (*e.g.,* clinical pharmacists, dieticians, registered practical or licensed nurses' offices, Christian Science practitioners' offices) who operate private or group practices in their own centers or clinics or in the facilities of others, such as hospitals.[185]

[184] *See* U.S. Census Bureau, Statistics of U.S. Businesses, 2015, NAICS code 611310 (Colleges, Universities, and Professional Schools) (identifying 2,457 firms and 4,788 establishments nationwide).

[185] *See* the industry description for offices of miscellaneous health practitioners, NAICS code 921399, *https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=621399&search=2012* NAICS Search.

TABLE 2—ESTIMATED NUMBER OF PERSONS AND ENTITIES COVERED BY THIS FINAL RULE

Type	Covered by 45 CFR 88 in 2011 Rule?	Covered by final rule?	Estimate (low)	Estimate (high)
1. State and Territorial Governments[186]	Yes	Yes	58	58
2. Federally recognized Tribes[187]	Yes	Yes	573	573
3. Counties[188]	Yes	Yes	3,234	3,234
Hospitals				
4. General & Medical Surgical Hospitals[189]	Yes	Yes	1,859	2,694
5. Specialty Hospitals (*e.g.,* psychiatric, substance abuse, rehabilitation, cancer, maternity)[190]	Yes	Yes	553	801
Nursing and Residential Care Facilities				
6. Skilled Nursing Facilities[191]	Yes	Yes	6,316	9,153
7. Residential Intellectual and Developmental Disability Facilities[192]	Yes	Yes	4,310	6,246
8. Continuing Care Retirement Communities[193]	Yes	Yes	2,605	3,775
9. Other Residential Care Facilities (*e.g.,* group homes)[194]	Yes	Yes	2,247	3,256
Entities Providing Ambulatory Health Care Services				
10. Entities providing Home Health Care Services[195]	Yes	Yes	15,062	21,829
11. Offices of Physicians (except Mental Health Specialists)[196]	Yes	Yes	115,673	167,642
12. Offices of Physicians (Mental Health Specialists)[197]	Yes	Yes	7,324	10,614
13. Offices of Mental Health Practitioners (except Physicians)[198]	Yes	Yes	14,340	20,782
14. Offices of Dentists[199]	Yes	Yes	86,874	125,904
15. Offices of Chiropractors[200]	Yes	Yes	26,725	38,732
16. Offices of Optometrists[201]	Yes	Yes	13,775	19,964
17. Offices of Physical, Occupational and Speech Therapists, and Audiologists[202]	Yes	Yes	17,623	25,540
18. Offices of Podiatrists[203]	Yes	Yes	5,314	7,701
19. Offices of All Other Misc. Health Practitioners[204]	Yes	Yes	11,502	16,670
20. Family Planning Centers[205]	Yes	Yes	999	1,448
21. Freestanding Ambulatory Surgical and Emergency Centers[206]	Yes	Yes	2,908	4,214
22. HMO Medical Centers[207]	Yes	Yes	78	113
23. Kidney Dialysis Centers[208]	Yes	Yes	305	442
24. Outpatient Mental Health and Substance Abuse Centers[209]	Yes	Yes	3,776	5,472
25. Diagnostic Imaging Centers[210]	Yes	Yes	3,209	4,651
26. Medical Laboratories[211]	Yes	Yes	2,278	3,302
27. Ambulance Services[212]	Yes	Yes	2,185	3,167
28. All Other Outpatient Care Centers (*e.g.,* centers and clinics for pain therapy, community health, and sleep disorders)[213].	Yes	Yes	3,880	5,623
29. Entities Providing All Other Ambulatory Health Care Services (health screening, smoking cessation, hearing testing, blood banks)[214].	Yes	Yes	2,391	3,465
Insurance Carriers				
30. Direct Health and Medical Insurance Carriers[215]	Yes	Yes	607	880
Entities Providing Social Assistance Services				
31. Entities Serving the Elderly and Persons with Disabilities (provision of nonresidential social assistance services to improve quality of life)[216].	Yes	Yes	9,051	36,205
32. Entities Providing Other Individual Family Services (*e.g.,* marriage counseling, crisis intervention centers, suicide crisis centers)[217].	Yes	Yes	5,310	21,240

[186] Assumes coverage of the 50 States, DC, Puerto Rico, 6 U.S. Territories, and the Island Areas.

[187] Assumes all federally recognized Tribes get HHS funds. Indian Health Service, FY 2019 Justification of Estimates for Appropriations Committees CJ–1 (2018), *https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2019CongressionalJustification.pdf.*

[188] U.S. Census Bureau, 2010 Census Geographic Entity Tallies by State and Type, *https://www.census.gov/geo/maps-data/data/tallies/all_tallies.html* (total counties and equivalent areas for the U.S., Puerto Rico, the U.S. Territories, and the Island Areas). The Department assumed that every county receives Federal funds as a recipient or a sub-recipient.

[189] U.S. Census Bureau, Statistics of U.S. Businesses, 2015 (released Sept. 2017), *https://www.census.gov/data/datasets/2015/econ/susb/2015-susb.html* (nationwide count of firms for NAICS Code 622110).

[190] *Id.* (sum of the nationwide count of firms for NAICS Codes 622210 and 622310).

[191] *Id.* (relying on the nationwide count of firms for NAICS Code 623110).

[192] *Id.* (nationwide count of firms for NAICS Code 623210).

[193] *Id.* (nationwide count of firms for NAICS Code 623311).

[194] *Id.* (nationwide count of firms for NAICS Code 623990).

[195] *Id.* (nationwide count of firms for NAICS Code 621610).

[196] *Id.* (nationwide count of firms for NAICS Code 621111).

[197] *Id.* (nationwide count of firms for NAICS Code 621112).

[198] *Id.* (nationwide count of firms for NAICS Code 621330).

[199] *Id.* (nationwide count of firms for NAICS Code 621210).

[200] *Id.* (nationwide count of firms for NAICS Code 621310).

[201] *Id.* (nationwide count of firms for NAICS Code 621320).

[202] *Id.* (nationwide count of firms for NAICS Code 621340).

[203] *Id.* (nationwide count of firms for NAICS Code 621391).

[204] *Id.* (nationwide count of firms for NAICS Code 621399).

[205] *Id.* (nationwide count of firms for NAICS Code 621410).

[206] *Id.* (nationwide count of firms for NAICS Code 621493).

[207] *Id.* (nationwide count of firms for NAICS Code 621491).

[208] *Id.* (nationwide count of firms for NAICS Code 621492).

[209] *Id.* (nationwide count of firms for NAICS Code 621420).

[210] *Id.* (nationwide count of firms for NAICS Code 621512).

[211] *Id.* (nationwide count of firms for NAICS Code 621511).

[212] *Id.* (nationwide count of firms for NAICS Code 621910).

[213] *Id.* (nationwide count of firms for NAICS Code 621498).

[214] *Id.* (nationwide count of firms for NAICS Code 62199).

TABLE 2—ESTIMATED NUMBER OF PERSONS AND ENTITIES COVERED BY THIS FINAL RULE—Continued

Type	Covered by 45 CFR 88 in 2011 Rule?	Covered by final rule?	Estimate (low)	Estimate (high)
33. Entities Providing Child and Youth Services (*e.g.,* adoption agencies, foster care placement services) [218].	Yes	Yes	2,169	8,674
34. Temporary Shelters (*e.g.,* short term emergency shelters for victims of domestic violence, sexual assault, or child abuse; runaway youth; and families caught in medical crises) [219].	Yes	Yes	805	3,219
35. Emergency and Other Relief Services (*e.g.,* medical relief, resettlement, and counseling to victims of domestic or international disasters or conflicts) [220].	Yes	Yes	169	675
Other Entities				
36. Pharmacies and Drug Stores [221]	Yes	Yes	13,490	19,550
37. Research and Development in Biotechnology [222]	Yes	Yes	2,347	3,402
38. Colleges, Universities, & Professional Schools [223]	Yes	Yes	*316*	*2,457*
Subtotal, subject to part 88 in 2011 Rule			392,236	613,367
39. HHS awarded funds appropriated to the U.S. Dept. of State & USAID [224]	No	Yes	65	130
Subtotal, incremental increase in entities			65	130
TOTAL, estimated entities subject to this rule			392,301	613,497

Approximately 392,236 to 613,367 persons and entities were subject to part 88 in effect based on the 2011 Rule by virtue of the Weldon, Coats-Snowe and Church Amendments. The Department estimated that the number of entities that this final rule covers that are subject to 22 U.S.C. 7631(d) and 2151b(f), but not paragraph (d) of the Church Amendments is small and, possibly, non-existent because paragraph (d) of the Church Amendments does not tie funding to a particular appropriation or financial stream.[225] Consequently, this final rule *may* add 65 to 130 new persons and entities to the coverage of 45 CFR part 88.[226] With this incremental increase, this final rule covers an average of 502,899 entities, which is the mid-point of the low (392,301 entities) and high-end (613,497 entities).

(A) Estimated Persons and Entities Required To Sign an Assurance and Certification of Compliance

Relative to the persons and entities shown in Table 2, a smaller subset is subject to § 88.4, which requires certain recipients to submit an assurance and certification of compliance and exempts others. The Department calculated the subset of persons and entities subject to § 88.4 by (1) removing estimated sub-recipients from the total because § 88.4 applies to recipients, not sub-recipients, and (2) removing the estimated recipients exempted from § 88.4, as identified in § 88.4(c)(1) through (4). *Infra* at Table 3 shows this calculation.

Calculating Estimated Sub-Recipients

The Department sought comment on the policy for § 88.4 to apply to recipients but not sub-recipients, noting that the proposed rule took this approach to reduce the burden on small entities. The Department did not receive comments addressing this question. One commenter, however, raised the question that, if the proposed rule's policy was to exempt clinicians who are part of State Medicaid programs, then the proposed rule did not exclude such clinicians from § 88.4. However, clinicians who receive reimbursement through a State Medicaid program are *sub-recipients* of the Department (*i.e.,* recipients of the State, which is the recipient in relationship to the Department). Under a Medicaid fee-for-service model, the State pays the clinicians directly, and under the managed care model, a State pays a fee to a managed care plan, which in turn pays the clinician for the services a beneficiary may require that are within the managed care plan's contract with the State to serve Medicaid beneficiaries.[227] As sub-recipients, these clinicians that accept Medicaid are not subject to § 88.4, unless they become recipients from HHS Federal financial assistance or other Federal funds from a non-exempt HHS program (*i.e.,* a program not captured in § 88.4(c)(2) through (4)).

In the proposed rule, OCR explained that it had not found a reliable way to calculate the number of sub-recipients of this rule. The Department assumed entities in *supra* at Table 2 were all recipients except for counties, which the Department assumed were sub-recipients for the purpose of this

[215] *Id.* (nationwide count of firms for NAICS Code 524114).

[216] *Id.* (nationwide count of firms for NAICS Code 624120).

[217] *Id.* (nationwide count of firms for NAICS Code 624190).

[218] *Id.* (nationwide count of firms for NAICS Code 624110). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[219] *Id.* (nationwide count of firms for NAICS Code 624221). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[220] *Id.* (nationwide count of firms for NAICS Code 624230). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[221] *Id.* (nationwide count of firms for NAICS Code 44610).

[222] *Id.* (nationwide count of firms for NAICS Code 541711).

[223] *Id.* (nationwide count of firms for NAICS Code 611310). As described *supra* at part IV.C.2.iii (methodology), the Department assumes 13%–100% of institutions of higher-education are covered. *See supra* at XI.C.2.iii for a detailed explanation for how the Department supplemented Statistics of U.S. Businesses data with award data from the Department's Tracking Accountability in Government Grants System.

[224] U.S. Dep't of Health & Human Servs., Tracking Accountability in Government Grants System (TAGGS) *http://taggs.hhs.gov* (last visited Dec. 19, 2017). HHS identified unique awardees for FY 2017 from HHS PEPFAR implementing agencies (CDC, HRSA, SAMHSA, NIH, FDA) to foreign nonprofits, foreign governments, and international organizations and used this number as a lower-bound. Because the Department also receives funds appropriated to USAID through one or more reimbursable agreements, the Department assumed that there could be twice as many recipients and sub-recipients after considering the awardees from these reimbursable agreements and thus multiplied and lower-bound by two.

[225] The text of paragraph (d) states that its protection applies for health service program and research activities ''funded in whole or part under a program administered by the [HHS] Secretary.''

[226] *But see supra* at part IV.C.2.ii (discussing the application of paragraph (d) of the Church Amendments to such grantees).

[227] *See, e.g.,* Provider Payment and Delivery Systems, MACPAC, *https://www.macpac.gov/medicaid-101/provider-payment-and-delivery-systems/* (last visited Jan. 29, 2019).

calculation. The Department received no comments regarding information, data sources, studies, or reports that could assist the Department in improving its approach.

To refine the estimates, the Department reconsidered the proposed rule's blanket assumption that all counties are sub-recipients for purposes of this calculation. Using the ''Advanced Search'' function in TAGGS, the Department identified the total number of county awardees and de-duplicated the results to obtain one list of unique county awardees from the Department for FY 2017. This approach identified 625 counties (19 percent) receiving funding directly from HHS as recipients. Assuming that all counties are HHS recipients or sub-recipients, the remaining of 2,609 counties (81 percent) would be sub-recipients that are not subject to § 88.4's application. This method is a more accurate proxy for estimating the number of sub-recipient counties. If some entities (other than counties) in Table 2 are sub-recipients rather than recipients, then the Department overestimated the scope of entities subject to § 88.4's application that are not exempted.

Calculating Exempted Recipients in § 88.4(c)(1) Through (4)

The Department received no comments regarding the methods used to estimate the scope of exempted recipients under § 88.4(c)(1) through (4). Therefore, the Department maintains the proposed rule's methods.

The Department assumed that all physicians' offices would meet the criteria in § 88.4(c)(1) and subtracted out 255,684 to 370,557 entities, which represents the lower and upper-bounds of all physicians' offices.[228] If some physicians' offices are recipients through an instrument other than Medicare Part B reimbursement, then the Department overestimated the number of physicians' offices exempted due to § 88.4(c)(1). The Department does not have the necessary data to estimate the impact of the final rule's new exemption for pharmacies and pharmacists that receive Medicare Part B because the Department does not know whether such pharmacies or pharmacists exempted under § 88.4(c)(1) are Department recipients (as opposed to sub-recipients) of HHS Federal financial assistance or other Federal funds from a non-exempt HHS program (*i.e.,* a program not captured in § 88.4(c)(2) through (4)).

The Department subtracted out 11,220 to 44,879 persons and entities that meet the criteria in § 88.4(c)(2) and (3) regarding the exemption for recipients of grant programs administered by the Administration for Children and Families or the Administration for Community Living.[229] The exemption applies if the program meets certain regulatory criteria indicating that its purpose is unrelated to health care and certain types of research, does not involve health care providers, and does not involve referral for the provision of health care. The Department reasonably assumed that all persons and entities that provide child and youth services (such as adoption and foster care) would fall into this exemption. The Department also reasonably assumed that all entities providing services for the elderly and persons with disabilities (by providing nonresidential social assistance services to improve quality of life) would fall within this exemption. The Department did not subtract out the entities providing ''Other Individual Family Services'' (*e.g.,* marriage counseling, crisis intervention centers, suicide crisis centers) because there is a significant likelihood of referral for the provision of health care at crisis intervention centers and suicide crisis centers.

The Department subtracted out 230 Tribes and Tribal Organizations for the exemption in § 88.4(c)(4). This number represents the total Tribes and Tribal Organizations that operate contracts under Title I of the ISDEA Act.[230] This final rule revises the requirements for federally recognized Indian tribes, tribal organizations, or urban Indian organizations who are recipients by virtue of grants or cooperative agreements under 42 U.S.C. 290bb–36, removing the requirement that such entities comply with § 88.4. The Department does not have the data necessary to estimate the number of such entities who are recipients of funds via such grants or cooperative agreements that are not already captured within the scope of the exemption in § 88.4(c)(4).

TABLE 3—ESTIMATED RANGE OF RECIPIENTS SUBJECT TO THE ASSURANCE AND CERTIFICATION REQUIREMENTS (§ 88.4)

	Low-end estimate	Upper-bound estimate
Persons or Entities Subject to This Final Rule	392,301	613,497
Sub-Recipients to which § 88.4 Does Not Apply	−2,609	−2,609
Range of Recipients Exempted from § 88.4	*−267,134*	*−415,666*
Total, Recipients Subject to § 88.4	122,558	195,222

(B) Estimated Number of Recipients Incentivized To Provide Voluntarily a Notice of Rights (§ 88.5)

The proposed rule contained a freestanding notice provision with mandatory and discretionary elements. As finalized in this rule, the notice provisions are no longer mandatory. Section 88.5 incentivizes recipients and the Department to provide notice to persons, entities, and health care entities concerning Federal conscience and anti-discrimination laws. The rule intends to accomplish this goal by providing that OCR will consider a recipient's posting of a notice as non-dispositive evidence of compliance with this rule in any investigation or compliance review pursuant to this rule, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.

The Department expects that some regulated recipients and Department components will voluntarily post the notice through one of the methods specified. Because recipients are the primary entities responsible for compliance under this rule, the Department assumes that sub-recipients will not be induced by the rule to post a notice on their own accord.

The proposed rule did not permit recipients to modify the pre-written

[228] Sum of rows 11, 12, 14–16, and 18 of Table 2.

[229] Sum of rows 31 and 33 of Table 2.

[230] Indian Health Service, FY 2019 Justification of Estimates for Appropriations Committees CJ–243 (2018), *https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2019CongressionalJustification.pdf.*

notice in appendix A. As discussed in the preamble for § 88.5, *supra* at part II.B, public comments asked for flexibility to modify the notice's content as applied to recipients. Paragraph (c) in § 88.5 of the final rule provides greater flexibility by stating that the recipient and the Department should *consider* using the model text provided in appendix A for the notice, but may tailor the content to address the laws that apply to the recipient or Department under the rule and the recipient's or Department's particular circumstances. Accordingly, the Department assumes that some recipients that voluntarily post notices will modify the pre-written notice in appendix A. Recipients that modify the pre-written notice likely will do so at the firm level (*i.e.,* corporate level) rather than the establishment level (*i.e.,* at each facility). For instance, a company with common ownership and control over multiple facilities would modify the notice at its corporate (''firm'') level but would post substantially the same physical notices at each facility (''establishment'') where notices are customarily posted to permit ready observation for members of the workforce or for the public.

The Department estimates that eighteen recipient types, such as medical specialists, elder care providers, and entities providing primarily social services, are likely to modify the pre-written notice as applied to them (in relation to, for example, abortion). The sum of the low-end and high-end estimates of firms associated with these eighteen recipient types is 225,751 (low-end) and 332,707 (high-end), providing an average of 279,229 firms. Given the discretionary nature of the notice provision, the Department adjusts the range of firms downward by 50 percent for the purpose of this calculation to derive the values shown in *infra* at Table 4: 112,876 firms (low-end) and 166,354 firms (high-end) for a mid-point of 139,615 firms likely to modify the pre-written notice in appendix A. To the extent that recipient types other than those listed in Table 4 modify the notice, the Department has underestimated the scope of impact.

TABLE 4—ESTIMATED NUMBER OF FIRMS ASSOCIATED WITH EACH RECIPIENT TYPE LIKELY TO MODIFY THE NOTICE OF RIGHTS IN APPENDIX A (§ 88.5)

Type	Estimate (low)	Estimate (high)
1. Skilled Nursing Facilities	3,158	4,577
2. Residential Intellectual and Developmental Disability Facilities	2,155	3,123
3. Continuing Care Retirement Communities	1,302	1,888
4. Other Residential Care Facilities (*e.g.,* group homes)	1,123	1,628
5. Entities providing Home Health Care Services	7,531	10,915
6. Offices of Physicians, Mental Health Specialists	3,662	5,307
7. Offices of Mental Health Practitioners (except Physicians)	7,170	10,391
8. Offices of Dentists	43,437	62,952
9. Offices of Chiropractors	13,363	19,366
10. Offices of Optometrists	6,888	9,982
11. Offices of Physical, Occupational and Speech Therapists, and Audiologists	8,811	12,770
12. Offices of Podiatrists	2,657	3,851
13. Offices of All Other Miscellaneous Health Practitioners	5,751	8,335
14. Kidney Dialysis Centers	152	221
15. Outpatient Mental Health and Substance Abuse Centers	1,888	2,736
16. Diagnostic Imaging Centers	1,605	2,326
17. Medical Laboratories	1,139	1,651
18. Entities Providing Child and Youth Services (*e.g.,* adoption agencies, foster care placement services)	1,084	4,337
Total, Firms Likely to Modify Pre-Written Notice Text	112,876	166,354

The Department assumes that, for all posting methods, recipients will execute the posting at the establishment level. Using the range of firms subject to this rule as a foundation, the range of establishments associated with those recipients is shown *infra* at in Table 5. Table 5 employs the methodology used for calculating the number of persons and entities shown in Table 2, but uses the U.S. Census Bureau's Statistics of U.S. Businesses data for establishments rather than firms.[231] The footnotes detail the assumptions and calculations for each line and assume 69–100 percent of the industry as covered unless otherwise noted, which parallels the assumptions for Table 2.

Because there is a high degree of uncertainty as to the proportion of recipients that will voluntarily post notices through one or more of the methods specified in § 88.5 in the first year of the rule's implementation, the Department adjusts the range of establishments associated with covered recipients downward by 50 percent for the purpose of this calculation. The values derived from this calculation appear *infra* at in Table 5: 261,735 establishments (low-end) and 408,918 establishments (high-end) for a mid-point of 335,327 establishments. The Department adjusts downward the range of establishments that would voluntarily provide notices of rights in years two through five by 25 percent, relative to year one, to reflect attrition: 196,301 establishments (low-end) and 306,689 establishments (high-end) for a mid-point of 251,495 establishments.

[231] *https://www.census.gov/data/datasets/2015/econ/susb/2015-susb.html.* The Department relied on the data file titled ''U.S. & State, NAICS, detailed employment sizes (U.S., 6-digit and States, NAICS sectors).'' The latest data available is from 2015 that the Bureau made available in September of 2017, and this data relied on the 2012 NAICS codes. *Id.*

TABLE 5—NUMBER OF PHYSICAL ESTABLISHMENTS OF EACH RECIPIENT TYPE ESTIMATED TO VOLUNTARILY PROVIDE NOTICE OF RIGHTS IN YEAR 1 (§ 88.5)

Type	Establishments assoc. with covered recipients		Establishments assoc. with covered recipients that would voluntarily post notices in Year 1		
	(Low)	(High)	(Low)	(High)	Mid-point
State and Territorial Governments [232]	58	58	29	29	29
Federally recognized Tribes [233]	573	573	287	287	287
Counties [234]	625	625	313	313	313
General and Medical Surgical Hospitals [235]	3,699	5,361	1,850	2,681	2,265
Specialty Hospitals (*e.g.,* psychiatric, substance abuse, rehabilitation, cancer, maternity) [236]	1,139	1,651	570	826	698
Skilled Nursing Facilities [237]	11,789	17,085	5,894	8,543	7,218
Residential Intellectual & Developmental Disability Facilities [238]	22,611	32,770	11,306	16,385	13,845
Continuing Care Retirement Communities [239]	3,668	5,316	1,834	2,658	2,246
Other Residential Care Facilities (*e.g.,* group homes) [240]	3,627	5,256	1,813	2,628	2,221
Entities providing Home Health Care Services [241]	21,377	30,981	10,688	15,491	13,089
Offices of Physicians (except Mental Health Specialists) [242]	147,817	214,228	73,909	107,114	90,511
Offices of Physicians (Mental Health Specialists) [243]	7,498	10,867	3,749	5,434	4,591
Offices of Mental Health Practitioners (except Physicians) [244]	15,022	21,771	7,511	10,886	9,198
Offices of Dentists [245]	92,895	134,631	46,448	67,316	56,882
Offices of Chiropractors [246]	26,999	39,129	13,500	19,565	16,532
Offices of Optometrists [247]	15,101	21,885	7,550	10,943	9,246
Offices of Physical, Occupational & Speech Therapists, & Audiologists [248]	25,213	36,541	12,607	18,271	15,439
Offices of Podiatrists [249]	5,769	8,361	2,885	4,181	3,533
Offices of All Other Misc. Health Practitioners [250]	12,731	18,450	6,365	9,225	7,795
Family Planning Centers [251]	1,584	2,295	792	1,148	970
Freestanding Ambulatory Surgical & Emergency Ctrs. [252]	4,609	6,679	2,304	3,340	2,822
HMO Medical Centers [253]	560	812	280	406	343
Kidney Dialysis Centers [254]	5,144	7,455	2,572	3,728	3,150
Outpatient Mental Health & Substance Abuse Ctrs. [255]	7,227	10,474	3,614	5,237	4,425
Diagnostic Imaging Centers [256]	4,553	6,598	2,276	3,299	2,788
Medical Laboratories [257]	7,360	10,667	3,680	5,334	4,507

[232] Assumes coverage of the 50 States, DC, Puerto Rico, 6 U.S. Territories, and the Island Areas.

[233] Assumes all federally recognized Tribes get HHS funds. Indian Health Service, FY 2019, Justification of Estimates for Appropriations Committees, CJ–243 (2018), *https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/display_objects/documents/FY2019CongressionalJustification.pdf.*

[234] U.S. Census Bureau, 2010 Census Geographic Entity Tallies by State and Type, *https://www.census.gov/geo/maps-data/data/tallies/all_tallies.html* (total counties and equivalent areas for the U.S., Puerto Rico, the U.S. Territories, and the Island Areas). The values estimate the number of recipient counties and exclude estimated sub-recipients.

[235] U.S. Census Bureau, Statistics of U.S. Businesses, 2015 (released Sept. 2017), *https://www.census.gov/data/datasets/2015/econ/susb/2015-susb.html* (nationwide count of firms for NAICS Code 622110).

[236] *Id.* (sum of the nationwide count of firms for NAICS Codes 622210 and 622310).

[237] *Id.* (nationwide count of firms for NAICS Code 623110).

[238] *Id.* (nationwide count of firms for NAICS Code 623210).

[239] *Id.* (nationwide count of firms for NAICS Code 623311).

[240] *Id.* (nationwide count of firms for NAICS Code 623990).

[241] *Id.* (nationwide count of firms for NAICS Code 621610).

[242] *Id.* (nationwide count of firms for NAICS Code 621111).

[243] *Id.* (nationwide count of firms for NAICS Code 621112).

[244] *Id.* (nationwide count of firms for NAICS Code 621330).

[245] *Id.* (nationwide count of firms for NAICS Code 621210).

[246] *Id.* (nationwide count of firms for NAICS Code 621310).

[247] *Id.* (nationwide count of firms for NAICS Code 621320).

[248] *Id.* (nationwide count of firms for NAICS Code 621340).

[249] *Id.* (nationwide count of firms for NAICS Code 621391).

[250] *Id.* (nationwide count of firms for NAICS Code 621399).

[251] *Id.* (nationwide count of firms for NAICS Code 621410).

[252] *Id.* (nationwide count of firms for NAICS Code 621493).

[253] *Id.* (nationwide count of firms for NAICS Code 621491).

[254] *Id.* (nationwide count of firms for NAICS Code 621492).

[255] *Id.* (nationwide count of firms for NAICS Code 621420).

[256] *Id.* (nationwide count of firms for NAICS Code 621512).

[257] *Id.* (nationwide count of firms for NAICS Code 621511).

[258] *Id.* (nationwide count of firms for NAICS Code 621910).

[259] *Id.* (nationwide count of firms for NAICS Code 621498).

[260] *Id.* (nationwide count of firms for NAICS Code 62199).

[261] *Id.* (nationwide count of firms for NAICS Code 524114).

[262] *Id.* (nationwide count of firms for NAICS Code 624120).

[263] *Id.* (nationwide count of firms for NAICS Code 624190).

[264] *Id.* (nationwide count of firms for NAICS Code 624110). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[265] *Id.* (nationwide count of firms for NAICS Code 624221). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[266] *Id.* (nationwide count of firms for NAICS Code 624230). As described *supra* at part IV.C.2.iii (methodology), for entities whose principal purpose is not health care, the Department assumes 25%–100% of industry is covered.

[267] *Id.* (nationwide count of firms for NAICS Code 44611).

[268] *Id.* (nationwide count of firms for NAICS Code 541711).

[269] *Id.* (nationwide count of firms for NAICS Code 611310). As described *supra* at part IV.C.2.iii (methodology), the Department assumes 13%-100% of institutions of higher-education are covered.

[270] U.S. Dep't of Health & Human Servs., Tracking Accountability in Government Grants System (TAGGS) *http://taggs.hhs.gov* (last visited Dec. 19, 2017).

TABLE 5—NUMBER OF PHYSICAL ESTABLISHMENTS OF EACH RECIPIENT TYPE ESTIMATED TO VOLUNTARILY PROVIDE NOTICE OF RIGHTS IN YEAR 1 (§ 88.5)—Continued

Type	Establishments assoc. with covered recipients		Establishments assoc. with covered recipients that would voluntarily post notices in Year 1		
	(Low)	(High)	(Low)	(High)	Mid-point
Ambulance Services[258]	3,271	4,740	1,635	2,370	2,003
All Other Outpatient Care Centers (*e.g.,* centers & clinics for pain therapy, community health, & sleep disorders)[259]	8,054	11,672	4,027	5,836	4,931
Entities Providing All Other Ambulatory Health Care Services (health screening, smoking cessation, hearing testing, blood banks)[260]	3,670	5,319	1,835	2,660	2,247
Direct Health & Medical Insurance Carriers[261]	3,712	5,379	1,856	2,690	2,273
Entities Serving the Elderly and Persons with Disabilities (provision of nonresidential social assistance services to improve quality of life)[262]	10,475	41,899	5,237	20,950	13,093
Entities providing Other Individual Family Services (*e.g.,* marriage counseling, crisis intervention centers, suicide crisis centers)[263]	7,184	28,736	3,592	14,368	8,980
Entities providing Child & Youth Services (*e.g.,* adoption agencies, foster care placement services)[264]	2,901	11,604	1,451	5,802	3,626
Temporary Shelters (*e.g.,* short-term emergency shelters for victims of domestic violence, sexual assault, or child abuse; runaway youth; and families caught in medical crises)[265]	1,013	4,053	507	2,027	1,267
Emergency & Other Relief Services (*e.g.,* medical relief, resettlement, & counseling to victims of disasters or conflicts)[266]	309	1,236	155	618	386
Pharmacies and Drug Stores[267]	30,450	44,130	15,225	22,065	18,645
Research and Development in Biotechnology[268]	2,505	3,631	1,253	1,816	1,534
Colleges, Universities, & Professional Schools[269]	615	4,788	308	2,394	1,351
HHS awarded funds appropriated to the U.S. Department of State & USAID[270]	65	130	33	65	49
Total	523,470	817,836	261,735	408,918	335,327

3. Estimated Burdens

There are five categories of estimated monetized burdens for this final rule as summarized in Table 6, as well as burdens that cannot be fully monetized. No commenters provided alternate reliable methodologies for monetizing the rule's burden. Potential burdens associated with access to care and health outcomes are discussed *infra* at part IV.C.4.vii.

Several comments argued that the rule would impose costs on entities associated with the increased risk of litigation over incidents of providers' exercise of conscience, both between patients and providers and between individual providers and their employers.

Regading an increase in risk for litigation between individual providers and their employers, the Department agrees with the potential effect these commenters predict: That some entities will change their behavior to come into compliance, or improve compliance, with Federal conscience and anti-discrimination laws. Indeed, the proposed rule's RIA and this RIA estimate the burden associated with such voluntary behavior changes. However, whether entities take such action because of the risk of litigation is too speculative and uncertain for calculation in the RIA. Further, some courts have held that there is no private right of action under the Coats-Snowe and Church Amendments, excluding litigation as a viable alternative for individuals.[271]

Regarding an increase in risk for litigation between patients and providers, the Department agrees that this rule will result in more providers exercising conscientious objections to participating in services requested by patients, and that such objections may give rise to lawsuits by patients. However, the Department is unaware of any reliable basis for estimating the frequency or cost of such lawsuits.

Public comments regarding general burdens are integrated throughout the RIA. Public comments regarding the burden, if any, that may result from secondary effects of this rule, such as the monetary impact of certain health outcomes that may arise from increased conscience protection, are discussed in the rule's analysis of benefits, *infra* at IV.C.4.

[271] *See, e.g., Vermont All. for Ethical Healthcare, Inc.* v. *Hoser,* 274 F. Supp. 3d 227, 240 (D. Vt. 2017); *Hellwege* v. *Tampa Family Health Centers,* 103 F. Supp. 3d 1303, 1311–12 (M.D. Fla. 2015); Order at 4, *National Institute of Family and Life Advocates, et al.* v. *Rauner,* No. 3:16–cv–50310 (N. D. Ill. July 19, 2017), ECF No. 65. *See also supra* at part II.A (describing the lack of private remedies).

[272] The totals in Table 6: Cost Summary of the Final Rule may not appear to add correctly, but that is due to rounding.

TABLE 6—COST SUMMARY OF THE FINAL RULE

(Discounted 3% and 7% in millions) [272]

	Year 1	Year 2	Year 3	Year 4	Year 5	Total (for undiscounted) annualized (for discount'd.)
Familiarization (undiscounted)	$135	$–	$–	$–	$–	$135
Familiarization (3%)	120					120
Familiarization (7%)	103					103
Assurance & Certification (undiscounted)	156	142	142	142	142	724
Assurance & Certification (3%)	138	123	119	116	112	608
Assurance & Certification (7%)	119	101	95	89	83	486
Voluntary Notice (undiscounted)	93	14	14	14	14	150
Voluntary Notice (3%)	83	12	12	11	11	130
Voluntary Notice (7%)	71	10	9	9	8	108
Voluntary Remedial Efforts (undisc.)	7	7	7	7	7	36
Voluntary Remedial Efforts (3%)	6	6	6	6	6	31
Voluntary Remedial Efforts (7%)	6	5	5	5	4	24
OCR Enforcement Costs (undisc.)	3	3	3	3	3	15
OCR Enforcement Costs (3%)	3	3	2	2	2	12
OCR Enforcement Costs (7%)	2	2	2	2	2	10
Total Costs (undiscounted)	394	167	167	167	167	1,061
Total Costs (3%)	350	144	140	135	131	901
Total Costs (7%)	301	119	111	104	97	731

In this impact analysis, the Department calculates labor costs using the mean hourly wage (including benefits and overhead) for a:

- Lawyer at $134.50 per hour ($67.25 per hour × 2),[273]
- Executive at $186.88 ($93.44 per hour x 2),[274]
- Administrative assistant at $38.78 per hour ($19.39 per hour × 2),[275]
- Web developer at $69.38 per hour ($34.69 per hour × 2),[276] and
- Paralegal at $51.84 per hour ($25.92 per hour × 2).[277]

These calculations reflect the Department's standard practice of calculating a fully loaded mean hourly wage (*i.e.,* wage including benefits and overhead) by multiplying the hourly pre-tax wage by two.[278]

(i) Familiarization Burden

The Department estimates a one-time burden for regulated persons and entities to familiarize themselves with the rule. The proposed rule estimated that on average, each person and entity would spend one hour for familiarization. The Department received comments arguing that this estimate fell short of the time needed to accomplish the goal of familiarization. In light of these comments, the Department increased the estimate from one hour to two hours. This increase reflects persons' and entities' familiarization of the rule's requirements and procedures, including the changes from the proposed rule.

The burden is a one-time opportunity cost of staff time (a lawyer) to review the rule. The labor cost is approximately $135.3 million in the first year ($134.50 per hour × 2 hours × 502,899 entities (the average of the low and high-end range in Table 2)) and zero dollars in years two through five. This estimated burden represents the average burden; some persons and entities may spend substantially more time than two hours on familiarization, and others may spend less time.

(ii) Burden Associated With Assurance & Certification (§ 88.4)

As a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds from the Department, § 88.4 requires every application for Federal financial assistance or Federal funds from the Department to which the rule applies to provide, contain, or be accompanied by an assurance and a certification that the applicant or recipient will comply with applicable Federal conscience and anti-discrimination laws and this rule.

The burden to recipients not exempted from § 88.4 is the opportunity cost of recipient staff time (1) to review the assurance and certification language and the requirements of the Federal conscience and anti-discrimination laws referenced or incorporated, (2) to review recipient-wide policies and procedures or take other actions to self-assess compliance with applicable Federal conscience and anti-discrimination laws, and (3) to implement any actions necessary to come into compliance. *Infra* at Table 7 summarizes these costs.

The Department estimates that each recipient not exempted from § 88.4 will spend an average of 4 hours annually reviewing the assurance and certification language and the Federal conscience protection and associated anti-discrimination laws and the rule. In the 2008 Rule, the Department estimated that it would take 30 minutes to certify compliance with three laws: The Church, Weldon, and Coats-Snowe Amendments.[279] In this rule, there are 22 additional statutory provisions covered. Citations for each law are clearly listed in the rule, the texts of the statutes are easily found online. For many entities, it will be immediately clear when a law that this rule implements and enforces does not apply to those entities.[280] The Department

[273] Bureau of Labor Statistics, Occupational and Employment Statistics, Occupational Employment and Wages, May 2016, *https://www.bls.gov/oes/current/oes_nat.htm* (occupation code 23–1011).

[274] *Id.* (occupation code 11–1011).

[275] *Id.* (occupation code 43–6010).

[276] *Id.* (occupation code 15–11134).

[277] *Id.* (occupation code 23–2011).

[278] ''Guidance for Regulatory Impact Analysis,'' Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 2016, at 28; *see, e.g.,* 81 FR 31451 (2016) (''We note that one commenter suggested that we use a factor higher than 100% to adjust wages for overhead and benefits. However, the commenter's argument is based on Federal overhead rates for contracts, and not evidence of the resource costs associated with reallocating employee time. As a result, we do not adopt the commenter's recommendation, and we continue to use the Department's standard of 100% for overhead and fringe benefits.'').

[279] 73 FR 78072, 78095 (2008 Rule).

[280] For example, provisions applicable to Medicaid recipients would not apply to entities that do not receive Medicaid and, presumably, most entities readily know if they receive Medicaid reimbursements as a result of providing care to Medicaid beneficiaries.

estimates each recipient will take 10 minutes per law on average, yielding an additional 3.5 hours on average to review the applicability of the additional laws that this rule proposes to enforce, for a total burden of 4 hours per recipient, per year, for the first five years. Some recipients may spend considerably less time; others may spend considerably more time.

The labor cost is a function of a lawyer spending 3 hours reviewing the assurance and certification and an executive spending one hour to review and sign, as § 88.4(b)(2) requires a signature by an individual authorized to bind the recipient. The weighted mean hourly wage (including benefits and overhead) is $147.60 per hour.[281] The labor cost is $93.8 million each year for the first five years ($147.60 per hour × 4 hours × 158,890 recipients [282]).

The Department estimates that 79,445 recipients, which is half of recipients required to assure and certify compliance (158,890 recipients/2), will spend 4 hours reviewing policies and procedures or taking other actions to self-assess compliance with applicable Federal conscience and anti-discrimination laws each year for the first five years after publication of the rule. Some entities will spend more time and others will spend less time. The Department reasonably estimates such action because § 88.4(b)(4) states that the submission of an assurance and certification will not relieve a recipient of the obligation to come into compliance prior to or after submission of such assurance or certification. A first step to such actions may be to review organization-wide safeguards (or best practices), such as policies and procedures, that may be, or should be, in place. The labor cost is a function of a lawyer spending 3 hours and an executive spending one hour, which produces the a weighted mean hourly wage of $147.60 per hour. The labor cost for self-assessing compliance is a total of $46.9 million annually for the first five years ($147.60 per hour × 4 hours × 79,445 entities).

The Department estimates that approximately 5 percent of entities (or 16 percent of those subject to § 88.4) will take an organization-wide action to improve compliance in the first year and 0.5 percent of entities (1.6 percent of those subject to § 88.4) will take a similar action annually in years two through five. This percentage equates to 25,145 recipients in year one and 2,514 recipients annually in years two through five. The Department estimates that these recipients would spend 4 hours annually, on average, to take remedial efforts. The Department estimates that recipients will spend an average of 4 hours to update policies and procedures, implement staffing or scheduling practices that respect an exercise of conscience rights under Federal law, or disseminate the recipient's policies and procedures. The labor cost is a function of a lawyer spending 3 hours and an executive spending one hour, which produces a weighted mean hourly wage of $147.60 per hour. The labor cost is $14.8 million in year one ($147.60 per hour × 4 hours × 25,145 entities) and approximately $1.5 million annually for years two through five ($147.60 per hour × 4 hours × 2,514 entities).

If entities were already fully taking steps to be educated on, and comply with, all the laws that are the subject of this rule, there would likely not be any costs within the first five years of publication for remedial efforts associated with a recipient's commitment to assure and certify compliance in § 88.4. However, the fact that there would be such costs is wholly consistent with the Department's stated justifications for the rule (*i.e.,* lack of knowledge of, and compliance with, the laws).

Several commenters expressed concern with the possible burden on health care providers resulting from the requirements to assure and certify compliance with Federal conscience and anti-discrimination laws. In drafting the rule, the Department considered the possible burden on health providers and exempted certain classes of recipients from § 88.4. The impact of the exemption means that, unless such exempted persons or entities are recipients of Federal financial assistance or other Federal funds from the Department through another instrument, program, or mechanism, approximately 70 percent of recipients do not have to comply with the assurance and certification requirement.[283] Given the magnitude of the exemption, § 88.4 does not unduly burden persons and entities subject to the rule. Where the exemption does not apply, the burdens arising from assurances and certifications are fully justified, as they are with every other anti-discrimination law that requires a similar assurance or certification.

Moreover, the Department is committed to ensuring that a health care provider's assurance and certification of compliance with Federal conscience and anti-discrimination laws does not unduly burden small health care providers in their delivery of health care services to the community. As explained in the Paperwork Reduction Act analysis for § 88.4, the Department is leveraging existing grant, contract, and other Departmental forms and government-wide systems, consistent with OMB's government-wide effort to reduce recipient burden.[284]

Finally, the Department has made efforts to reduce the frequency of information collected. Paragraph (b)(6) in § 88.4 allows an applicant or recipient to incorporate the assurances and certification by reference in subsequent applications to the Department or Department component if prior assurances or certifications are initially provided in the same year. This approach is consistent with the HHS Grants Policy Statement.[285] Because recipients file an assurance of compliance form ''for the organization and . . . not . . . for each application,'' a recipient with a signed assurance on file assures through its signature on the award application that it has a signed Form 690 on file.[286]

Paragraph (b)(1) in § 88.4 requires submission more frequently than the time of application if the applicant or recipient fails to meet a requirement of the rule, or OCR or the relevant Department component has reason to suspect or cause to investigate the possibility of such failure. The ability to require assurances outside of the application process permits OCR and the Department to ensure that the Federal financial assistance or other Federal funds that the Department awards are used in a manner compliant with Federal conscience and anti-discrimination laws and the final rule. As this is a new requirement, OCR has

[281] Sum of ($134.50 × .75) and ($186.88 × .25).

[282] This estimate is the average of the low and high-end estimates in *supra* at Table 3. As explained *supra* at part IV.C.2.iv.A, sub-recipients are not subject to this requirement.

[283] The average between the lower-bound (267,134) and upper-bound (415,666) of recipients exempted is 341,400 recipients, which represents 68 percent of the estimated total 500,290 recipients of the rule (which is the result of 502,899 entities minus the estimated 2,609 counties that are estimated for the purposes of this rule as sub-recipients). If fewer recipients are impacted by the exemptions in § 88.4(c)(1) through (4) than estimated, and if such recipients do not receive HHS Federal financial assistance or other Federal funds from a non-exempted HHS program, then the Department overestimated the percent of recipients that do not have to comply with the assurance and certification requirement.

[284] Exec. Office of the President, Memorandum from Mick Mulvaney, Dir., Office of Management & Budget to Heads of Executive Departments and Agencies, Strategies to Reduce Grant Recipient Reporting Burden, at 2 (Sept. 5, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-24.pdf.*

[285] *See* HHS Grants Policy Statement (Jan. 2007), *https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

[286] *Id.* at I–31.

not yet gained the experience to know how many recipients, if any, would be required by OCR or a Department component to sign assurances on an as-needed basis outside of the application process.

TABLE 7—SUMMARY OF ASSURANCE AND CERTIFICATION COSTS

Cost categories	Total costs	
	Year 1	Annually Years 2–5
Review and Sign	$93.8	$93.8
Review Policies & Procedures	46.9	46.9
Update or Disseminate Policies & Procedures	14.8	1.5
Total Costs	155.6	142.2

(iii) Burden Associated With Voluntary Actions To Provide Notices of Rights (§ 88.5)

As explained *supra* at in part IV.C.2.iv.B, the Department assumes that some recipients and Department components will voluntarily post and distribute a notice of rights through one of the methods specified in § 88.5. The expected cost to recipients and the Department is $93.4 million in the first year of the rule's implementation and $14.1 million annually in years two through five. The cost to the Department makes up a miniscule portion of the cost—about 0.04 percent in the first year and 0.10 percent annually in years two through five.

As explained *supra* at part IV.C.2.iv.B, the Department assumes that an estimated 139,615 recipients (the average of the low-end and high-end estimates shown in Table 4) will likely modify the pre-written notice in Appendix A as applied to them. Because the scope of such modifications would likely be limited, the Department estimates that modifying the notice constitutes a minimal opportunity cost of 20 minutes of a lawyer's time for drafting and 10 minutes of an executive's time to provide final approval. For some recipients, modifying the notice will take more of the lawyer's or executive's time; for other recipients, it will take less time. The weighted mean hourly wage (including benefits and overhead) of these two occupations is $151.79 per hour.[287] The one-time labor cost is $10.6 million in the first year ($151.79 per hour × 0.5 hours × 139,615 recipients).

There is uncertainty regarding how many recipients will voluntarily post notices and which method or methods in § 88.5 they will employ. For the purposes of this calculation, the Department erred on the side of overestimating the burden and assumes that recipients likely to provide notice will do so:

- At physical locations,
- On their websites, and
- In two publications, such as a personnel manual or other substantially similar document for members of the recipient's workforce; in an application for membership in the recipient's workforce or for participation in a service, benefit or other program, including for training or study; or in a student handbook or other substantially similar document for students participating in a program for training or study, including for post-graduate interns, residents, and fellows.

One commenter suggested that the final rule should permit the notice requirement to be posted electronically only, and not in paper form. Because the rule does not require recipients to provide notices of rights, recipients are free to provide notice in electronic form only and have such action considered by OCR as non-dispositive evidence of compliance with the substantive provisions of the rule, to the extent such notices are otherwise provided according to § 88.5 and relevant to the particular OCR investigation or compliance review.

For recipients that voluntarily post notices through any of the methods in § 88.5, the Department assumes that the recipients will act by the end of the first year after the rule's implementation. An entity that posts on its website and in a physical location will incur a one-time burden. A recipient that includes an insert in a publication may incur an annual burden represented by the costs of labor, materials (paper and ink for hard-copy publication), and in some cases, postage.

Burden for Voluntary Posting in Physical Locations

The Department estimates that it will take ⅓ of an hour for an administrative assistant to print notice(s) and post them in physical locations of the establishment where notices are customarily posted to permit ready observation. For some establishments, it may take an administrative assistant longer to perform his or her respective functions; for other establishments, it may take less time. As shown in Table 5, 335,327 establishments is the average in the range of estimated establishments associated with covered recipients that would voluntarily post notices in the first year after the rule's publication. The estimated labor cost is $4.3 million (⅓ hour × $38.78 per hour × 335,327 establishments).

A key uncertainty is the total number of locations per establishment where recipients commonly post notices; the per-establishment total will vary based on multiple factors. These factors include the type of recipient, floor plans of the building, the square footage of the common areas, the square footage of the building, the number of floors, the size of the workforce, and the number of ultimate beneficiaries, among other variables. The Department assumes that the average establishment will print and post five notices in physical locations where notices are customarily posted; larger recipients might post more and smaller recipients might post fewer. The Department assumes that the cost of materials (paper and ink) is $0.05 per page. Based on this assumption, the first-year cost to post 5 notices across all establishments would be $83,832 (335,327 establishments × $.05 per page × 5 pages). Because the Department assumes that this cost is a one-time cost during the first year of this rule's implementation, the cost will not recur in years two through five. The total labor and materials costs for 335,327 establishments to post notices in physical locations is $4.4 million ($4.3 million in labor costs and $83,832 for materials) in year one with zero recurring costs.

Burden for Web Posting

To post the notice on the web, the Department estimates that it will take 2 hours for a web developer to execute the design and technical elements for posting. A key uncertainty is whether

[287] Sum of ($134.50 × .67) and ($186.88 × .33).

each recipient maintains separate websites for each facility, and if so, whether those websites are maintained at the corporate (*i.e.,* firm) level or facility (*i.e.,* establishment) level. In the proposed rule, the Department erred on the side of overestimating the burden and assumed that recipients maintained separate websites for each of their facilities at the establishment level. Thus, a web developer at each recipient's physical location would post the notice on the web. For some establishments, it may take web developers longer to perform their respective functions; for other establishments, it may take less time. This labor cost is approximately $46.5 million (2 hours × $69.38 per hour × 335,327 establishments).

If, however, recipients maintain one website at the corporate level for all of their facilities, a web developer at the firm-level, rather than at each establishment, would bear the burden. In contrast to recipients bearing the cost across 335,327 facilities, about 250,145 recipients at the firm-level would each bear this cost, which equals $34.7 million (2 hours × $69.38 per hour × 250,145 firms). Thus, if recipients voluntarily post notices on their websites, and if they do so at their corporate level for all sites including facility-specific websites, recipients would save on average about 25 percent of their labor costs to execute web posting in this manner.

Burden for Posting in Two Publications

The Department did not receive specific comments estimating the annual costs of labor or materials that may be incurred by entities that include notices in relevant publications as set forth in the proposed rule (which remain voluntary under the final rule). Given the key uncertainties in how recipients will disseminate the notices of rights, as explained in subsequent paragraphs, the Department assumes that: (1) Establishments that include notices of rights in publications will most often do so in online publications or in hard-copy publications hand-distributed, where the notice's inclusion results in an additional 100 hard copy notices per establishment per year, and (2) half of the establishments associated with covered recipients voluntarily providing hard-copy notices (*i.e.,* 167,663 establishments in year one and 125,747 establishments annually in years two through five) [288] will distribute the publications via U.S. mail where the weight of the notice incrementally increases the postage costs.

The Department assumes that, within the first year after the rule's publication, each recipient voluntarily posting notices in publications would identify the two publications in which to include the notice, revising the documents or their layouts to include the notice, or otherwise printing an insert to include with hard copies of the publication. A recipient that adds the notice to a publication disseminated only online that is not disseminated in hard copy will incur a one-time labor cost with zero costs for materials. In contrast, recipients that add the notice to a publication disseminated via hard copy may incur the annual cost of materials or incremental postage, or both, as well as the associated labor cost. For instance, a recipient that is unable to add the notice to the back page of an existing publication might add the notice as a separate page to the underlying publication or may print notices annually to include as inserts with the hard-copy publications. A recipient that does so and disseminates the publication via U.S. mail might incur incremental postage costs if the incremental weight of the notice places the total weight of the mailing in the next bracket of postage costs.

These assumptions may differ from recipients' implementation experiences. Some recipients may distribute fewer than 100 hard-copy notices with relevant publications while others will distribute more than 100. Some recipients that mail relevant publications with notices of rights may not experience any incremental postage costs if the total weight of the mailings with notices does not place the mailing in the next postage bracket. Notwithstanding these uncertainties, the Department sets forth the following monetization as its best estimate of the burden based on its assumptions.

The Department assumes an administrative assistant would spend an average of two hours in year one and one hour annually in years two through five to execute the activities except for mailing. The average labor cost, excluding mailing-related labor costs, is $26.0 million in year one ($38.78 per hour × 2 hours × 335,327 establishments) and $9.8 million annually in years two through five ($38.78 per hour × 1 hour × 251,495 establishments).[289] Based on the marginal cost of postage per ounce of $0.15,[290] an annual number of mailings of 100 pages per establishment, average annual labor cost for mailing of $38.78 per hour, and an average number of labor hours per mailing of 0.25 hours, the total costs due to the voluntary mailing of notices are $4.1 million in year one [291] and $3.1 million annually in years two through five.[292] Finally, the annual cost of printed materials for notices (both mailed and hand distributed) is $1.7 million (335,327 establishments × 100 pages × $.05 per page) in year one and $1.3 million annually in years two through five (251,495 establishments × 100 pages × $.05 per page).

In sum, the burden to recipients related to the voluntary posting and distributions of notices that § 88.5 incentivizes is $93.4 million in the first year and $14.1 million annually in years two through five.

Burden to the Federal Government

Federal agencies are encouraged to identify costs and savings to government agencies where significant.[293] The burden of § 88.5 to the Federal government is the cost associated with the Department's components posting the notice voluntarily. Although this burden is not significant, the RIA monetizes the burden for completeness.

The Department uses a framework for estimating its burden that is similar to the framework used to estimate the burden to recipients. For instance, the Department assumes that half of its components will post notices of rights voluntarily in the first year of the rule's publication (*i.e.,* 10 of the 20 HHS Operating and Staff Divisions will post online). Because of attrition in compliance, 75 percent of that number will continue posting annually in certain publications in years two through five. As a proxy for that assumption to enable monetization of the physical posting, the Department assumes that staff at half of 533 physical

[288] Product of 335,327 establishments times 50 percent for year one. Product of 251,495 establishments times 50 percent for years two through five.

[289] Under the final rule, because all the notice provisions are voluntary, the Department assumes that 75% of entities that voluntarily provide notices in year one will continue to do so in out years and there will be lower attrition compared to the estimate provided in the proposed rule.

[290] *See* U.S. Postal Service Postage Rates, *https://www.stamps.com/usps/current-postage-rates/.*

[291] Sum of incremental postage of $2.5 million ($0.15 per mailing × 100 mailings × 167,663 establishments) and incremental labor of $1.6 million ($38.78 per hour × 0.25 hours × 167,663 establishments).

[292] Sum of incremental postage of $1.9 million ($0.15 per mailing × 100 mailings × 125,747 establishments) and incremental labor of $1.2 million ($38.78 per hour × 0.25 hours × 125,747 establishments).

[293] OMB Circular A–4, Regulatory Analysis 37 (2003), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

locations owned or leased by the Department [294] (277 physical locations) would post an average of five hard-copy notices per physical location and would post in certain publications. In years two through five, 75 percent of the 277 locations (207 locations) would post in certain publications. The Department assumes that the duration of the anticipated activities (*e.g.,* downloading, printing, and posting the notice) would take Department staff the same time as it would take recipient staff. Similarly, the Department assumes that half of the physical locations associated with HHS components voluntarily providing hard copy notices (*i.e.,* 138 locations in year one and 104 locations annually in years two through five) [295] will distribute the publications via U.S. mail where the weight of the notice incrementally increases the postage costs.

The methods diverge in how the web posting is implemented (by each HHS Operating and Staff Division but not by each facility owned or leased) and in the average hourly wage rate used: A GS–7 step 5,[296] which, adjusted upward for benefits and overhead, equals $47.44 per hour ($23.72 per hour × 2).[297]

Based on these assumptions, the total labor cost is $5,277 in the first year: ($47.44 per hour × ⅓ hour × 277 locations) + ($47.44 per hour × 2 hours × 10 Departmental components). Cost for materials for the notice is $1,452 dollars [298] in the first year after publication of the final rule and $1,037 annually [299] in years two through five. Finally, the cost associated with the portion of Department locations that mail notices of rights with certain publications is $3,713 in the first year [300] and $2,785 [301] annually in years two through five. In sum, the burden to the Federal government associated with § 88.5 is $36,677 in the first year and $13,660 annually in years two through five.

(iv) Record-Keeping (§ 88.6(b))

Paragraph (b) in § 88.6 of the final rule requires recipients and sub-recipients to maintain records evidencing their compliance with this part. In the proposed rule, the Department did not identify record-keeping as a separate burden because it assumed that recipients and sub-recipients already maintain records in the course of evidencing compliance with the terms and conditions of a Federal award, which would include not only financial management requirements but all applicable Federal laws, including Federal conscience and anti-discrimination laws. The Department requested comment on that assumption. The Department received numerous comments stating that the record-keeping requirements in § 88.6(b) were too vague and requesting clarity on what kinds of records must be maintained. However, the Department received no comments contradicting its assumption that recipients and sub-recipients already follow record-keeping practices that suffice to document compliance with Federal civil rights laws. Therefore, because the Department understands that recipients and sub-recipients must document such compliance in the course of receiving a Federal award,[302] any potential marginal increase in the cost of maintaining records according to the clarity set forth in § 88.6(b) would be *de minimis.*

(v) Reporting a Finding of Noncompliance (§ 88.6(d))

Paragraph (d) in § 88.6 of the proposed rule would have required recipients and sub-recipients to report to the relevant Departmental funding component the existence of an OCR compliance review, investigation, or complaint under 45 CFR part 88 over a five-year period as such incidents arise and in any application for new or renewed Federal financial assistance or Departmental funding. The Department received numerous comments that stated this requirement was too burdensome.

Accordingly, the Department has significantly revised § 88.6(d). Recipients and sub-recipients would no longer have to report a compliance review, investigation, or complaint against them as it arises. Moreover, recipients and sub-recipients would only be required to disclose the existence of a determination by OCR of noncompliance with this rule in any application for new or renewed Federal financial assistance or Departmental funding (rather than reporting compliance reviews, investigations, or complaints). Recipients would be responsible for disclosing any OCR determinations of non-compliance made against their sub-recipients. Finally, the final rule shortens the reporting period from five to three years following an OCR determination of noncompliance.

Given the revisions to § 88.6(d), the Department has revisited its methodology for estimating the costs imposed by § 88.6(d). The Department estimates that the burden is the opportunity cost for recipients and sub-recipients who have had OCR determine that they are noncompliant with this rule to retrieve information from their records systems and enter in the application basic identifying information regarding the determination. The components to monetize this burden include: (1) The time spent for a staff member to execute the reporting functions and that person's fully loaded mean hourly wage, (2) the number of times a recipient or sub-recipient applies for new or renewed funding administered by the Department annually, and (3) the number of recipients and sub-recipients that OCR finds noncompliant with this part annually.

The Department estimates it would take a records custodian at the experience level of a paralegal about 15 minutes to retrieve the relevant information (such as date of the OCR determination of noncompliance and the OCR ''transaction number'' (*i.e.,* case number)) from the recipient's or sub-recipient's records and an administrative assistant 15 minutes to enter the information in the application for Federal financial assistance or other Federal funds from the Department. The mean weighted hourly wage for the paralegal and administrative assistant is

[294] Obtained from U.S. General Services Administration on October 30, 2018 (on file with HHS OCR).

[295] Product of 277 locations times 50 percent for year one. Product of 207 locations times 50 percent for years two through five.

[296] The hourly wage rates of staff are likely to vary from a GS–3 to a GS–11. The Department uses the mid-point GS-level and step and relies on hourly wage rates for the locality salary adjustment for the District of Columbia and surrounding geographic area.

[297] *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2016/DCB_h.pdf.* Executive Order 13771 requires agencies to estimate costs in 2016 dollars.

[298] Sum of costs for materials to post in physical locations (5 pages × $0.05 per page × 277 locations) plus costs for materials to post in certain publications (100 pages × $0.05 per page × 277 locations).

[299] Costs for materials to post in certain publications (100 pages × $0.05 per page × 207 locations).

[300] Sum of incremental postage of $2,074 ($0.15 per mailing × 100 mailings × 138 facilities) and incremental labor of $1,640 ($47.44 per hour × 0.25 hours × 138 facilities).

[301] Sum of incremental postage of $1,555 ($0.15 per mailing × 100 mailings × 104 facilities) and incremental labor of $1,230 ($47.44 per hour × 0.25 hours × 104 facilities).

[302] *See* 45 CFR 75.302 (regarding the sufficiency of an HHS awardee's financial management system, including ''records documenting compliance with Federal statutes, regulations, and the terms and conditions of the Federal award''). *See also id.* section 75.361 (requiring an HHS awardee to maintain records for three years from the date of the final expenditure report or from the date the awardee submits its quarterly or annual financial report).

$45.31.[303] The Department estimates that a recipient would bear this labor cost at the firm level for every award action the recipient applied, including new funding opportunities, supplemental funding, and non-competing continuations, among others.

Because OCR had no publicly available or reliable data source to estimate how many total applications for new or renewed funding in a fiscal year a recipient might make to the Department or its component, actual award data from HHS TAGGS was used as a proxy. The Department considered the number of award actions the Department and its components made to State agencies and State universities in FY 2017 to inform the estimate. Award data in HHS TAGGS for FY 2017 indicated that some State universities receive less than 100 awards per fiscal year and others receive nearly 2,000 awards. Some State agencies receive one or two awards per fiscal year and others receive 80 awards per fiscal year. Consequently, a recipient or sub-recipient found in violation of this part, on the extreme end, would expend $45,310 per year in labor costs at the firm level (2,000 applications per year × $45.31 per hour × 0.5 hours).

The most significant uncertainty for monetizing the burden of § 88.6(d) is the number of recipients and sub-recipients that OCR will determine as noncompliant with this rule. OCR employs a range of fact-finding methods and evaluates each complaint based on the relevant facts, circumstances, and law at issue, which is an approach that this rule codifies in § 88.7(d). OCR is gaining experience in handling the complexity and volume of complaints received alleging violations of the Weldon Amendment, Church Amendment, Coats-Snowe Amendment, and section 1553 of the Affordable Care Act. Most of the statutes that are the subject of the rule have no case law interpreting them. In addition, compared to OCR's experience handling complex cases for other civil rights and health information privacy matters, there is little institutional history of OCR enforcement of the Weldon Amendment, Church Amendments, Coats-Snowe Amendment, and section 1553 of the Affordable Care Act. Indeed, OCR was receiving only approximately 1.25 complaints per year alleging such violations during the eight years preceding the change in Administration. However, during FY 2018, the most recently completed fiscal year for which data are available, OCR received 343 complaints alleging conscience violations.[304] Given this variable posture at this stage of the Department's renewed efforts on conscience and religious freedom, the Department cannot reliably predict the number of OCR determinations of noncompliance to monetize this burden, but estimates that, for those to whom it applies, the related reporting cost is about $45,310 per year per entity with the highest number of applications for HHS funding.

(vi) Voluntary Remedial Efforts

The proposed rule noted that the Department anticipates that some recipients will institute a grievance or similar process to handle internal complaints raised to the recipient's or sub-recipient's attention. The rule does not require such a process, but in HHS OCR's enforcement experience, informal resolution of matters at the recipient or sub-recipient level may effectively resolve a beneficiary's or employee's concern. The Department received no comments regarding the proposed rule's methodology for estimating these costs. The Department anticipates 0.5 percent of entities, or 2,514 entities,[305] would conduct such internal investigations should complaints come to the recipient's or sub-recipient's attention or would undertake remedial efforts to resolve complaints.

The burden is the opportunity cost of staff time to handle internal investigations and take remedial action. Uncertainty exists as to how many hours annually a recipient or sub-recipient would devote to this effort. On average, the Department anticipates entities spending 20 hours annually: 16 hours of a lawyer's time and 4 hours of an executive's time. The weighted mean hourly wage (including benefits and overhead) is $144.98 per hour.[306] The labor cost is $7.3 million ($144.98 per hour × 20 hours × 2,514 entities). Some recipients may spend more than 20 hours on voluntary remedial efforts, and if this is the case, the labor cost will be greater. Other recipients may spend less than 20 hours, and if this is the case, the labor cost will be lower.

(vii) OCR Enforcement and Associated Costs

The Department anticipates a temporary increase in investigation and enforcement costs to OCR over the five years immediately following publication of the final rule. The Department expects this increase from the synergistic impact of persons' increased awareness of rights; increased confidence in the Department's ability and willingness to address those rights through the administrative complaint process; and an increase in the number of Federal conscience and anti-discrimination laws that the rule proposes to enforce. Indeed, since during FY 2018, the most recently completed fiscal year for which data are available, OCR received 343 complaints alleging conscience violations.[307]

The impact of the rule on OCR is the opportunity cost of about 12 FTEs to perform investigative responsibilities and coordinate enforcement with HHS components, as set forth in § 88.7, which is an increase of 7.5 FTEs from the proposed rule's estimate. These responsibilities include receiving and handling complaints, initiating compliance reviews, conducting investigations, coordinating compliance within the Department, and performing other associated activities as part of its program to promote widespread voluntary compliance of Federal conscience and anti-discrimination laws. The Department anticipates that the 12 FTEs consist of a member of the Senior Executive Service, four GS–15 employees, three GS–14 employees, two GS–13 employees, and two GS–12 employees, each paid a mid-level salary for the DC area.[308] The fully loaded labor cost (including benefits and overhead) for those twelve employees is estimated to be $3 million annually. The difference between the proposed rule's estimate for OCR's enforcement costs and this estimate is primarily the result of the increase in the number of FTEs. This increase is informed by OCR's experience since publication of the proposed rule, which has demonstrated that OCR will need to devote greater resources to the area of conscience protections than OCR had anticipated at the time of publication of the proposed

[303] Sum of (0.5 × $38.78 per hour) and (0.5 × $51.84 per hour).

[304] Complaint data based on OCR's system of records as of December 20, 2018.

[305] Product of 0.005 × 502,899 recipients.

[306] Sum of ($67.25 × .80) + ($93.44 × .20) and multiplied by two to adjust upward for overhead and benefits.

[307] Complaint data based on OCR's system of records as of December 20, 2018.

[308] Using the locality salary adjustment for the District of Columbia and surrounding geographic area, the annual salaries adjusted upward for benefits and overhead are as follows: $290,324 for GS–15 step 5 (145,162 × 2); $246,812 for GS–14 step 5 ($123,406 × 2); $208,866 for GS–13 step 5 ($104,433 × 2); and $175,642 for GS–12 step 5 ($87,821 × 2). *See https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/html/DCB.aspx*. The mid-level salary adjusted for benefits and overhead for a Senior Executive is $308,275 ($154,138 × 2), which is the average of the minimum and maximum salary for agencies with a certified SES performance appraisal system. *See https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/16Tables/exec/html/ES.aspx*.

rule. This estimate also has been adjusted upwards based on the method of calculating the wages of the FTEs. The proposed rule assumed a fully loaded wage for each of the 4.5 FTEs at $201,000, but the final rule estimates the cost of the 12 FTEs based on various GS levels and therefore relies upon the fully loaded wage using the estimated hourly salaries of employees under the GS schedule.

One commenter stated that the costs associated with OCR's enforcement efforts would double to the extent that both a provider and a patient file a complaint over the same matter. The commenter did not provide an example of a scenario where such ''double filing'' would occur. The Department believes that such scenarios, if they occur at all, would constitute a *de minimis* proportion of complaints received by OCR and would not involve increased or doubled costs, as resources for resolution of the two complaints would be shared through investigation of similar matters.

4. Estimated Benefits

The Department expects this final rule to produce a net increase in access to health care, improve the quality of care that patients receive, and secure societal goods that extend beyond health care. These effects will occur primarily via four mechanisms.

First, this rule is expected to remove barriers to the entry of certain health professionals, and to delay the exit of certain health professionals from the field, by reducing discrimination or coercion that health professionals anticipate or experience. Comments received by the Department demonstrate that a lack of conscience protections diminishes the availability of qualified health care providers. For example, in a survey of providers belonging to faith-based provider organizations, over nine in ten (91 percent) agreed with the statement, ''I would rather stop practicing medicine altogether than be forced to violate my conscience.'' [309]

Second, in supporting a more diverse medical field, the rule will benefit patients by improving doctor-patient relationships and quality of care. Academic literature supports the proposition that prohibiting the exercise of conscience rights in medicine decreases the quality of care that patients receive. As one article noted, ''[I]f physicians do not have loyalty and fidelity to their own core moral beliefs, it is unrealistic to expect them to have loyalty and fidelity to their professional responsibilities.'' [310]

Third, the rule is expected to decrease the harm that providers suffer when they are forced to violate their consciences, with attending improvements to patient health. Scholars have observed that ''[a]bandoning the right to conscience of the medical practitioner not only harms the individual practitioner but also threatens harm to his patients as well—the harms, however paradoxical it might seem, are actually inseparable from one another.'' [311]

Fourth, by providing for OCR investigation and HHS enforcement of Federal conscience and anti-discrimination laws, this final rule is expected to decrease unlawful discrimination, thereby permitting greater personal freedom. The rule will promote protection of religious beliefs and moral convictions, which is a societal good based on fundamental rights. As James Madison, often hailed as the ''father of the Constitution,'' wrote,

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.[312]

The Department received comments arguing that the proposed rule did not provide a sufficient articulation of the benefits that this rule would create or secure. In addition to analyses provided elsewhere in this preamble where germane, the Department's analysis of the rule's benefits responds to those comments and reflects a review of academic literature on the benefits of conscience protections in health care. The analysis demonstrates that the rule creates and secures significant benefits.

(i) Historical Support for Conscience Protections

The people of the United States of America have valued conscience protections since the country's founding era. Madison said that ''[c]onscience is the most sacred of all property; . . . the exercise of that, being a natural and unalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle.'' [313] George Washington wrote, ''Government being, among other purposes, instituted to protect the Persons and Consciences of men from oppression, it certainly is the duty of Rulers, not only to abstain from it themselves, but according to their Stations, to prevent it in others, . . . [and] the Consciencious [sic] scruples of all men should be treated with great delicacy & tenderness.'' [314] Some scholars have argued that the right to conscience was a hallmark of our founding and in fact, ''[p]rotection for individual exercise of rights of conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights.'' [315]

(ii) Expected Postive Impact on the Recruitment and Maintenance of Health Care Professionals

Numerous studies and comments show that the failure to protect conscience is a barrier to careers in the health care field.

A 2009 survey found that 82% of responding faith-based health care providers said it was either ''very'' or ''somewhat'' likely that they personally would limit the scope of their practice of medicine if conscience rules were not in place. This was true of 81% of medical professionals who practice in rural areas and 86% who work full-time serving poor and medically-underserved populations . . . 91% agreed, ''I would rather stop practicing medicine

[309] Christian Medical Association & Freedom2Care summary of polls conducted April, 2009 and May, 2011, available at *https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf.*

[310] D. White and B. Brody, *Would Accommodating Some Conscientious Objections by Physicians Promote Quality in Medical Care?,* 305 J. Am. Med. Assoc., May 4, 2011, at 1804–1805 (arguing that prohibiting conscience-based refusals ''may negatively influence the type of persons who enter medicine[,] . . . may negatively influence how practicing physicians attend to professional obligation[,] . . . [may cause] higher levels of callousness [by physicians] toward patients[,] . . . [and] may reciprocally diminish physicians' willingness to be sympathetic to and accommodating of patients' diverse moral beliefs'').

[311] Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals,* 49 Ariz. St. L.J. 549, 565 (2017); *see also* J. McCarthy & C. Gastmans (2015). *Moral distress: A review of the argument-based nursing ethics literature,* Nursing Ethics, 22(1), 131–152 (finding a consensus in academic literature that moral distress involves suffering that is psychological, emotional, and physiologic).

[312] James Madison, ''Memorial and Remonstrance Against Religious Assessments'', in 2 The Writings of James Madison 183, 184 (G. Hunt ed. 1901)

[313] James Madison, ''Property'', in The Founders' Constitution, *http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.*

[314] Letter from George Washington, to The Society of Quakers (October 13, 1789), *https://founders.archives.gov/documents/Washington/05-04-02-0188.*

[315] Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals,* 49 Ariz. St. L.J. 549, 561 (2017) (citing Lynn Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future,* 9 Ave Maria L. Rev. 1, 78 (2010)).

altogether than be forced to violate my conscience.'' [316]

The Department expects this rule to remove barriers to entry into the health care professions and into certain specializations within the health care profession [317] that arise from anticipated or experienced discrimination against such persons' religious beliefs or moral convictions. The Department also expects this rule to delay the exit of certain types of health professionals who are considering leaving the field in order to avoid such coercion or discrimination.[318] Although the rule does not create substantive protections beyond those in existing law, the Department believes that greater awareness and enforcement of those laws will help promote compliance and provide these follow-on effects. The Department has a significant interest in removing unlawful barriers to careers in the health care field.

The American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG), which represents 2,500 members and associates,[319] wrote in 2009, ''Like pro-life physicians generally, AAPLOG members overwhelmingly would leave the medical profession—or relocate to a more conscience-friendly jurisdiction—before they would accept coercion to participate or assist in procedures that violate their consciences.'' [320] AAPLOG's members and associates represent 13 percent of OB/GYNs in the United States.[321] Yet, as explained above, the Department has received significant anecdotal evidence of violations of the very conscience laws that Congress has enacted to protect such providers.

Because the rule is expected to remove a barrier to entry into the health care profession, the rule is expected to engender more people to be willing to enter the health care profession. Since there is an unmet need for health care providers in the United States, the Department assumes that an increase in the number of people willing to enter the health care profession (or a certain specialization within the health care profession) will result in an increase in the number of providers. Similarly, a certain proportion of decisions by currently practicing health providers to leave the profession are motivated by coercion or discrimination based on providers' religious beliefs or moral convictions,[322] so the Department anticipates that this rule's protections will decrease such departures from the field. Several commenters agreed anecdotally, stating that without the rule, access to medical care will suffer, because pro-life and faith-based medical providers will leave the profession.

The Department anticipates that this effect will also occur at the macro-scale in the health industry. For example, religiously-operated hospitals or health care systems, being granted greater security to practice medicine consistent with their religious beliefs, may find it worthwhile to hire more providers to serve more people, or to serve new populations (geographic, etc.), and will have a larger pool of medical professionals to choose from. The Department is not aware, however, of data enabling it to quantify any effect the rule may have on increasing the number of health care providers or the possible result of increasing access to care. The Department instead believes it is reasonable to conclude that the rule will increase, or at least not decrease, access to health care providers and services.

Several commenters stated that permitting or honoring conscientious objections, especially objections to referring for a health service, will exacerbate current lack of access to health care caused by the existing shortage of health care providers. This argument appears to not adequately take into account how greater awareness and enforcement of conscience rights will (1) remove a barrier to entry for certain individuals and institutions into the health care field, and (2) encourage individuals and institutions with religious beliefs and moral convictions currently in the health care field that may be thinking about leaving the field to remain, thereby creating net benefits. As described in the analysis below on the effects of this final rule on access to care, commenters who raised the claim that the rule would exacerbate current barriers to accessing health care failed to provide data that the Department believes enables a reliable quantification of the effect of the rule on access to providers and to care. For the reasons explained in this analysis, the Department disagrees with those commenters and believes it is more likely that removing the barriers to entry that may exist due to insufficient enforcement of conscience laws will result in an overall increase in access to care. Again, however, the Department is not aware of data that allows for an estimate of the effect of this rule on access to services.

(iii) Expected Postive Impact on Patient Care by Religious Health Care Professionals and Organizations

Many comments discussed the subject of the management of miscarriages in Catholic hospitals, alleging that Catholic hospitals' adherence to the Ethical and Religious Directives (ERDs), a document that expresses the teaching of the Catholic Church on matters of health care, risks harm to women undergoing a miscarriage. Approximately forty-three public comment submissions (each of which may represent more than one comment per submission) cited the article ''When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals,'' which describes experiences of a handful of physicians across the nation's Catholic health care facilities that adhered to ERDs.[323] The article relays anecdotes and quotes from six physicians out of the thirteen interviewed by the authors. The authors do not state why the article omits quotes from the other seven providers, nor does it highlight anecdotes from positive or neutral experiences with facilities' adherence to ERDs. The authors use the anecdotes and quotes as support for the idea that adherence to ERDs creates actual, potential, or perceived deficiencies in the facilities' management of miscarriagesy Catholic health care facilities. Anecdotal accounts of such a limited nature do not provide the Department with a robust basis for estimating the rule's impact on the management of miscarriages.

Twenty-four public comment submissions (each of which may represent more than one comment per submission) discussed the case of Tamesha Means, who was treated for a miscarriage by a Catholic hospital in

[316] Christian Medical & Dental Association summary of Key Findings on Conscience Rights Polling conducted April, 2009, available at *https://docs.wixstatic.com/ugd/809e70_2f66d15b88a0476e96d3b8e3b3374808.pdf.*

[317] *Id.* (finding that 20% of responding faith-based medical students chose not to pursue a career in obstetrics/gynecology because of perceived coercion and discrimination in that field).

[318] *Id.*

[319] *About Us,* American Association of Pro-Life Obstetricians and Gynecologists, *http://aaplog.org/about-us.*

[320] Letter from Lawrence J. Joseph, on behalf of the American Association of Pro-Life Obstetricians & Gynecologists, to the Office of Public Health & Science, Dep't of Health & Human Servs. 2 (Apr. 9, 2009), *http://downloads.frc.org/EF/EF09D50.pdf.*

[321] Compare i*d., with* Occupational Employment Statistics: Occupational Employment and Wages, May 2017 (March 30, 2018), *https://www.bls.gov/oes/current/oes291064.htm* (calculation assumes all AAPLOG members are OB/GYNs).

[322] Christian Medical Association & Freedom2Care summary of Online Survey of Faith-Based Medical Professionals polls conducted April, 2009 and May, 2011, available at *https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf.*

[323] Lori R. Freedman, *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals,* AM. J. PUB. HEALTH (2008), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/.*

Michigan, as an example of the harm to patient health caused by the faith-based practices of Catholic hospitals. Ms. Means subsequently brought a lawsuit claiming that the hospital's adherence to the ERDs constituted negligence. Yet the U.S. Court of Appeals for the Sixth Circuit ruled that Ms. Means had not alleged any harm or injury that could sustain her claim. *Means* v. *U.S. Conf. of Catholic Bishops,* No. 15–1779 (6th Cir. 2016).

The rule does not incorporate ERDs, and it does not enforce them. Nothing in the rule requires any individual or institutional provider to abide by any religious belief or moral conviction in his or her practice of medicine, and this rule does not take a position on whether any facility should or should not adhere to ERDs. Instead, the rule provides mechanisms for the enforcement for Federal conscience laws and anti-discrimination statutes, which are very different from ERDs in their text, structure, and legal significance.

Numerous commenters also cited statistics demonstrating that women of color are disproportionately served by Catholic hospitals. These commenters argued that, because ERDs prohibit Catholic hospitals from performing elective abortions, sterilizations, and other procedures that are counter to Catholic beliefs, women of color would be disproportionately harmed by exercises of religious belief protected by the rule.

The question of the ultimate effect of Catholic hospitals' adherence to ERDs on general access to reproductive health care, or access by any particular population, is outside the scope of this rule, but appears to be less settled than many commenters portray it to be. A metastudy in 2019 found a surprising paucity of data on the issue, stating that ''Although many may assume that institutional restrictions cause harm, our current understanding demonstrates that the landscape of provision [of reproductive health care services] is wide-ranging and complex in nature.'' [324] On the subject of miscarriages in particular, another study observed that ''Anecdotal reports have suggested that Catholic hospitals are putting women in danger due to the restrictions on miscarriage management. Contrary to these reports, we find some evidence that Catholic ownership is in fact associated with a *reduction in miscarriages that involve a complication,* suggesting that anecdotal accounts may not be indicative of a widespread pattern.'' [325]

Additionally, Catholic and other religiously affiliated health care providers play a major role in the delivery of health care to residents of the United States, including to underserved or underprivileged communities in particular, and are motivated by their beliefs to serve such communities.[326] As some commenters noted, that role may explain the disproportionately large share of charitable care and service given by religious providers to underserved communities. For example, Ascension, the nation's largest religiously affiliated non-profit health care system, had an annual operating revenue in 2016 that was about one-third the size of the annual operating revenue for Kaiser Permanente, the nation's largest non-profit health care system that is not religiously affiliated.[327] However, both organizations provided approximately $2 billion in care and other benefit programming to underserved communities in 2017.[328]

As the Department discusses above in response to comments, *supra* at part III.A., and as observed in the analysis below on the effects of this final rule on access to care, the Department concludes that the relationship between enforcement of Federal conscience and anti-discrimination laws through this rule and the impact on access to care is more complicated than suggested by commenters who claim this rule will decrease access. The Department believes the rule is just as, or more, likely to result in a net increase access to care because religious or other conscientiously objecting providers are already more likely to serve underserved communities; imposing violations on their conscience may lead to them limiting their practices rather than providing services in violation of their beliefs; and in some underserved communities patients may have a proportionate likelihood to agree with religious providers on controversial services such as abortion. The Department believes that, in passing Federal conscience and anti-discrimination laws, Congress likely intended to protect objecting providers precisely to prevent them from limiting their practices, especially to underserved communities, so as not to exacerbate shortages to those communities.

In light of the demonstrated commitment that religious health care providers have to caring for those for whom it may not always be profitable to care, it likely would harm underprivileged populations if the Department did not provide enforcement mechanisms and certain procedural and administrative requirements, as the alternative status quo risks driving such entities out of underserved communities altogether. Again, however, the Department is not aware of data either in its possession, from commenters, or from the public, that would enable the Department to reliably estimate what the impact of this rule would be on increasing, or allegedly decreasing, access to providers or services. The Department, instead, concludes that enforcing Federal conscience and anti-discrimination laws is an appropriate implementation of Congressional intent, and is more likely overall to lead to net benefits, and possibly to an increase in, health care provider and services access, than to lead to its reduction.

(iv) Expected Reduction in the Moral Distress That Individual Providers Experience

The Department anticipates that this final rule will reduce the incidence of the harm that being forced to violate one's conscience inflicts on providers.

[324] Thorne, et al., *Reproductive Health Care in Catholic Facilities: A Scoping Review,* Obstet. Gynecol. 2019;133:105–15, at 114.

[325] Hill, et al., *Reproductive Health Care in Catholic-Owned Hospitals,* NBER Working Paper No. 23768 (2017), at 4 (emphasis added).

[326] Ascension, RE: Docket HHS–OCR–2018–0002, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Mar. 27, 2018) (''As the largest non-profit health system in the U.S. and the world's largest Catholic health system, Ascension is committed to delivering compassionate, personalized care to all, with special attention to persons living in poverty and those most vulnerable. In FY2017, Ascension provided more than $1.8 billion in care of persons living in poverty and other community benefit programs.''); Catholic Health Association, REF: RIN 0945–ZA 03 Protecting Statutory Conscience Rights in Health Care; Delegations of Authority: Proposed Rule, 83 FR 3880, January 26, 2018 (Mar. 27, 2018) (''As a Catholic health ministry, our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of each and every human person, created in the image of God. Access to health care is essential to promote and protect the inherent and inalienable worth and dignity of every individual. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry and have driven CHA's long history of insisting on and working for the right of everyone to affordable, accessible health care.'').

[327] *Compare Kaiser Foundation Health Plan and Hospitals Report: 2017 Financial Results,* Kaiser Permanente (Feb. 9, 2018), *https://share.kaiserpermanente.org/article/kaiser-foundation-health-plan-hospitals-report-2017-financial-results/* (last visited Dec. 3, 2018), *with Our One Ascension Journey: Year in Review,* Ascension, *https://ascension.org/about/community-and-investor-relations/year-in-review* (last visited Dec. 3, 2018).

[328] *Facts and Stats,* Ascension, *https://ascension.org/About/Facts-and-Stats* (last visited Dec. 3, 2018); *Thrive: Give Back,* Kaiser Permanente, *https://thrive.kaiserpermanente.org/thrive-together/give-back* (last visited Dec. 3, 2018).

Substantial academic literature documents the existence among health care providers of ''moral distress,'' which is ''a sense of complicity in doing wrong'' and ''a deep anguish that comes from the nature of those circumstances [of the provider's work environment] as systemic, persistently recurrent, and pervasively productive of crises of conscience.'' [329] Moral distress functions as a pressure on providers to leave the health care profession: ''Prolonging these conditions can lead to exhaustion of their resistance resources and cause dissatisfaction with the workplace. Those who continue to work despite these conditions experience stress and burnout along with dissatisfaction.'' [330]

It is difficult to quantify the impact of the psychological trauma that results from moral distress. The strength of the provider's moral objection may vary based on the facts and circumstances of each case, including the service in question.

(v) Expected Patient Benefits From This Rule

To the extent the rule supports a more diverse medical field, the rule would create positive effects for patients. The rule could assist patients in seeking counselors and other health care providers who share their deeply held convictions. Some patients appreciate the ability to speak frankly about their own convictions concerning questions that touch upon life and death and treatment options and preferences with a doctor best suited to provide such treatment. A pro-life woman may seek a pro-life OB/GYN to advise her on decisions relating to her fertility and reproductive choices. Open communication in the doctor-patient relationship will foster better overall care for patients.

The benefit of open and honest communication between a patient and her doctor is difficult to quantify. One study showed that even ''the quality of communication [between the physician and patient] affects outcomes . . . [and] influences how often, and if at all, a patient will return to that same physician.'' [331] But poor communication negatively affects continuity of care and undermines the patient's health goals.[332] When conscience protections are robust, both patients and their physicians can communicate openly and honestly with one another at the outset of their relationship.

Facilitating open communication between providers and their patients also helps to eliminate barriers to care, particularly for people of faith, and especially in migrant communities where culturally competent care matters greatly. Because positions of conscience are often grounded in religious influence, ''[d]enying the aspect of spirituality and religion for some . . . patients can act as a barrier. These influences can greatly affect the well-being of people. They were reported to be an essential element in the lives of certain migrant women which enabled them to face life with a sense of equality.'' [333] It is important for patients seeking care to feel assured that their religious beliefs and their moral convictions will be honored. This will ensure that they feel they are being treated fairly.[334] And for some, being able to find health care providers that share the same moral convictions can be a source of personal healing.

As mentioned above, academic literature supports the proposition that prohibiting the exercise of conscience rights in medicine may decrease the quality of care that patients receive.[335] Commentary on the concept of moral distress among providers also expresses concern over how a degraded moral culture in health care can jeopardize patients' health.[336] As one review of literature on moral distress in nursing found, ''There is also a general consensus among the reviews that [moral distress] arises from a number of different sources, and that it (mostly) impacts negatively on nurses' personal and professional lives and, ultimately, harms patients.'' [337] Similarly, allowance for the exercise of conscience rights may promote ethical behavior by providers more broadly,[338] preserve a preferable model of health care practice,[339] and improve the doctor-patient relationship.[340]

[329] Christy A. Rentmeester, *Moral Damage to Health Care Professionals and Trainees: Legalism and Other Consequences for Patients and Colleagues,* Journal of Medicine and Philosophy, 33: 27–43, 2008, p. 37 (elaborating that ''[M]oral distress is a sense of complicity in doing wrong. This sense of complicity does not come from uncertainty about what is right but from the experience that one's power to resist participation in doing wrong is severely restricted by one's work environment and from *the experience that resisting participation in doing wrong exposes one to harm. Moral distress is generated in the health care work environment when a practitioner is aware that he is acting other than how he is motivated to act, but he believes that he cannot act as he is motivated to act without suffering some morally significant harm* . . . A number of situations can generate moral distress. Broad systemic changes in the recent past in health care—in how health care institutions are organized, how health care is financed, and how health care resources are managed, for example—have de facto demanded that individual practitioners adjust to being treated more like laborers than autonomous professionals and less like trusted fiduciaries than like employees with suspicious conflicts of interest.'') (emphasis added).

[330] Borhani et al., *The relationship between moral distress, professional stress, and intent to stay in the nursing profession,* J. Med. Ethics Hist. Med. 2014; 7: 3.

[331] Fallon E. Chipidza, *et al., Impact of the Doctor-Patient Relationship,* 17(5) The Primary Care Companion for CNS Disorders (2015), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4732308/.*

[332] *Id.*

[333] Emmanuel Scheppers, *et al., Potential Barriers to the Use of Health Services Among Ethnic Minorities: A Review,* 23 Family Practice 325, 343 (2006), *https://academic.oup.com/fampra/article/23/3/325/475515.*

[334] *Id.*

[335] Stephen J. Genuis and Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine,* 2013 Int'l. J. Fam. Med. 587541(2013), 4–5 (arguing that ''if successive physicians lose individual liberty of conscience and are morally compromised because of authoritarian dictates, the end result [may] be a diminishing of collective professionalism and physician morale, leading to inadequate patient care.'').

[336] Josh Hyatt, *Recognizing Moral Disengagement and Its Impact on Patient Safety,* J. of Nursing Regulation, 7:4, 18 (''Perhaps, patients experience the most significant and dangerous consequences of moral distress and moral disengagement . . . As health care providers reduce their communications with patients, patients may feel less safe and less satisfied with their medical experiences, and their clinical progress may be hindered. Further, if health care providers avoid patients or distance themselves from patients emotionally, they minimize their ability to advocate for their patients' welfare. Providers' emotional transition can also manifest as frustration toward patients, which may impair the quality of care. If health care providers do not fulfill their commitments or perform at a mediocre level, patient care can become inadequate or inappropriate . . . Lower quality of care leads to several costs for the patient. Patients may have to stay longer in the hospital or may miss care. Patient autonomy may also be threatened, and patients can be more likely to be coerced into pursuing therapeutic options they would otherwise decide against. Care can then become less patient centered and more paternalistic, a structure associated with worse health outcomes.'' (citations omitted)).

[337] J. McCarthy & C. Gastmans (2015). *Moral distress: A review of the argument-based nursing ethics literature,* Nursing Ethics, 22(1), 150.

[338] White and Brody, *supra* at note 120; Stephen J. Genuis and Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine,* 2013 Int'l. J. Fam. Med. 587541 (2013), 5 (''Compromise of personal moral integrity, of any kind or nature, will inevitably lead to an erosion of ethical behavior—a prospect not conducive to the optimal provision of healthcare.'').

[339] Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals,* 49 Ariz. St. L.J. 549, 565–66 (2017) (''[T]he 'public utility' model of medicine is not only a 'challenge [to] a conscientious physician's integrity as a physician,' it also 'depreciates his expertise, reduces his discretionary latitude in decisionmaking, and makes him a technical instrument of another person's wishes,' thereby 'subvert[ing] the healing purpose for which medicine is intended in the first place.' The myopic view of medicine that views a medical practitioner as a mere service provider 'can redound to the patient's harm by undermining the physician's moral obligation to provide sound advice and sound practice and to avoid medically useless or futile treatments.' '' (citations omitted)).

[340] Genuis & Lipp, at 5 (arguing that ''[freedom of conscience] promotes open, transparent physician-patient relationships and engenders patient advocacy . . . It is unlikely that individual patients or society would support a situation in which

Continued

As noted above, the Department assumes that this rule will increase the overall number of providers because (1) it will reduce barriers to entry into the health care field (and reduce pressure to leave the field) for individuals and organizations with religious beliefs or moral convictions, and (2) there exists an unmet demand for more providers. If the Department is incorrect in assuming that the rule will increase the overall number of providers—*i.e.,* if health care employers and medical training programs do not increase their hiring rates and the size of their programs, respectively, despite an increase in applicants—then the rule will increase the quality of the average provider, because the increase in the pool of available professionals will result in the selection of better providers overall. An increase in the quality of providers will increase the quality of care that patients receive. The Department is not, however, aware of data that provides a basis for quantifying these effects.

(vi) Expected Societal Benefits From This Rule

The rule will also yield lasting societal benefits. The rule mitigates current misunderstanding about what conduct the Federal government is legally able to support and fund, and educates individuals about their Federal conscience rights. By requiring certifications and assurances (with some exemptions), this rule provides a mechanism by which regulated entities will learn about—and, thus, be more likely to comply with—Federal conscience and anti-discrimination laws. The rule also provides a centralized office within the Department for individuals and institutions to file complaints with the Department when such individuals and institutions believe that their rights have been infringed. The Department expects that, as a result of this rule, more individuals, having been apprised of those rights, will assert them. The combination of these mechanisms will contribute to the general public's knowledge and appreciation of the foundational nature of these rights, as well as the protections afforded by Federal law.

Fostering respect for the existing Federal conscience and anti-discrimination laws also fosters lawfulness more generally. As one author stated,

> [L]aw and conscience are deeply intertwined. . . . But the phenomenon of conscience isn't important only to legal experts. Just as conscience helps explain why people follow legal rules, it helps explain why people follow other types of rules as well, such as employers' rules for employees, parents' rules for children, and schools' and universities' rules for students. It may also help explain why people adhere to difficult-to-enforce ethical rules and to the sorts of cultural rules (''social norms'') that make communal life bearable. . . . Twenty-first century Americans still enjoy a remarkably cooperative, law-abiding culture.[341]

Because fostering conscience in individuals—and compliance with Federal conscience laws—contribute to a more lawful and virtuous society, governments and their subdivisions have a significant interest in encouraging expressions of, and fidelity to, conscience.

> Forcing religious believers to violate their consciences involves harms that go beyond these individuals and their communities. When an individual is forced to act in ways that they view as deeply wrong, indeed as prohibited by the ultimate power responsible for everything that exists, moral habits essential for democratic citizenship are undermined.[342]

Governments also have an interest in ensuring the implementation and enforcement of existing laws, as part of the greater virtue of the rule of law.

It is difficult to monetize the benefits of respect for conscience to the individual and society as a whole, but they are clearly significant. As the Supreme Court has said:

> Both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.[343]

To protect the rights of conscience is to protect personal and interpersonal goods that permit peaceful and fulfilling lives.[344]

(vii) Analysis of Expected Effects of This Final Rule on Access to Care

The Department solicited information on costs that may arise as secondary effects of this rule, such as those associated with changes in health outcomes arising from increased protection of conscience for health care providers, as well as information about whether the existence or expansion of rights to exercise religious beliefs or moral convictions in health care improves or worsens patient outcomes and access to health care. The Department also requested comment on the related question of whether this final rule would result in unjustified limitations on access to health care.

The questions of access to care and of health outcomes are largely interdependent; access to care matters because of its effects on health outcomes, and the discussion in the public comments on health outcomes in the context of this rule were typically framed as a consequence of changes in access to care. Many comments the Department received argued that the rule would decrease access to care and harm patient health outcomes, and most such comments focused on the potential that providers would decline to perform a particular service for a patient.

Generally, however, instead of attempting to answer the difficult question of how this rule would affect access to care and health outcomes, and how to quantify those effects, such comments argued that significant discrimination against some segments of the population in health care exists and is *per se* proof that the rule would result in harm. The comments made this argument without establishing a causal relationship between this rule and how it would affect health care access, and without providing any data the Department believes enables a reliable quantification of the effect of the rule on access to providers and to care.

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physicians were being coerced to hide their convictions, making decisions they felt were morally wrong or unethical, or failing to act in what they perceived to be their patients' best interests''); Christian Medical Association & Freedom2Care summary of polls conducted April, 2009 and May, 2011, available at *https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf* (''77% of American adults surveyed said it is either 'very' or 'somewhat' important to them that 'that healthcare professionals in the U.S. are not forced to participate in procedures or practices to which they have moral objections;' '' ''88% of American adults surveyed said it is either 'very' or 'somewhat' important to them that they share a similar set of morals as their doctors, nurses, and other healthcare providers''). Comments received by the Department supported the finding that patients prefer providers who share their general belief system.

[341] Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* 17 (2011).

[342] Kathleen A. Brady, *The Disappearance of Religion from Debates about Religious Accommodation,* 20 Lewis & Clark L. Rev. 1093, 1110 (2017).

[343] *United States* v. *Seeger,* 380 U.S. 163, 169 (1965) quoting Harlan Fisk Stone, *The Conscientious Objector,* 21 Col. Univ. Q. 253, 269 (1919).

[344] Christopher C. Lund, *Religion Is Special Enough,* 103 Va. L. Rev. 481, 504 (2017) (''Freedom of moral conscience, it turns out, serves many of the same values served by freedom of religion—among other things, it can serve to ameliorate psychological distress, reduce civil strife, and preserve individual identity.'').

Other comments focused on whether health disparities exist among demographics that tend to utilize health services that may be the subject of conscientious objections protected by this final rule, but again without establishing a causal link between the provisions of this rule and the predicted or speculated effects.

Many comments observed that various demographic groups—women, LGBT people, immigrants and refugees, people of color, people living with HIV/AIDS, people with language barriers, people living in poverty, people with disabilities, and people living in rural areas—already face barriers to access to care and therefore would be disproportionately harmed by any additional barriers to access to care. The Department does not dispute that people in such demographic categories face health care disparities of various forms. The Department does disagree, however, with these comments' conclusions that the rule will create any negative effect on access to care that cannot be otherwise addressed, or that is not outweighed by gains in overall public health, overall access to care due to the removal of barriers for providers, or the benefits of compliance with the law and respect for conscience and religious freedom. In fact, as the Department discusses *supra* at part IV.C.4.iii and *infra,* the Department expects the rule to specifically benefit underserved populations.

A common sentiment expressed in comments was that conscience protections for providers are only appropriate to the extent they do not interfere with, impose upon, or in any way result in others feeling harmed. This type of objection is not accepted for any other anti-discrimination law. For example, the Fair Housing Act and the Americans with Disabilities Act, under certain circumstances, require building and apartment owners to incur costs to ensure that facilities are accessible to persons with disabilities. These statutes impose costs, but Congress and several Presidents have deemed it important to remove barriers to full participation in economic and social life for persons with disabilities. Similarly, America has since the founding recognized that Free Speech results in harm and hurt feelings (sometimes extraordinarily so) for many Americans, yet it is deemed a price worth paying. Conscience protection should be not be a special exception to the principle that fundamental rights do not depend on there being zero conflicts or disagreements in their exercise.

In any event, the objections based on potential (often temporary) lack of access to particular procedures as a result of enforcement of the law are really objections to policy decisions made by the people's representatives in Congress in enacting the Federal conscience and anti-discrimination laws in the first place, rather than to this rule's mechanisms for implementing and enforcing those laws.

An analysis of any change in access to care caused by this final rule is not the same as an analysis of the total impact of the exercise of religious belief and moral conviction on access to care. Nor is it the same as estimating the total impact of discrimination against women, LGBT individuals, or individuals in any other population demographic on access to care. Rather, the question involves isolating the impact of the exercises of religious belief or moral conviction attributable to this final rule specifically, over and above whatever impact is attributable to the pre-existing base rate of exercise of religious belief or moral conviction.

Different types of harm can result from denial of a particular procedure based on an exercise of such belief or conviction. First, the patient's health might be harmed if an alternative is not readily found, depending on the condition. Second, there may be search costs for finding an alternative. Third, the patient may experience distress associated with not receiving a procedure he or she seeks. These three potential harms, however, would also be applicable for denials of care based on, for example, inability to pay the requested amount. Fourth, there may be a harm resulting from a conscientious objection to referring for a health service, distinct from the harm of the initial objection to performing the service. Fifth, some commentators allege others in the community to which the patient belongs may be less willing to seek medical care.

On the other hand, it is important not to assume that every patient who wants a particular service is offended by a provider's unwillingness to provide that service, or wishes that the provider would do so against his or her religious beliefs or moral convictions. Some persons, out of respect for the beliefs of providers, may want a service but not take any offense, nor deem it any burden on themselves, for the provider to not provide that service to them. Some patients may even value the health care provider's willingness to obey his or her conscience, because the patient feels that provider can be trusted to act with integrity in other matters as well. The Department does not believe it is appropriate to assume that all patients who want a particular service also want to force unwilling providers to provide it in violation of their consciences.

Lastly, numerous comments focused on the potential for a patient to feel insulted or emotionally distressed because of a perception that a provider, in declining for reasons of religious belief or moral conviction to perform an objected-to service or procedure, is expressing disapprobation of the patient, especially regarding his or her personal identity or personal conceptions of morality. Although the Department does not understand such conscientious objections to be necessarily intended to convey such disapprobation, the Department recognizes that, in some circumstances, some patients do experience emotional distress as a consequence of providers' exercise of religious beliefs or moral convictions. However, Congress, in considering the statutes enforced by this rule, did not establish balancing tests that weigh such emotional distress against the right to abide by one's conscience.

On the other side of the equation, those who suffer discrimination on the basis of their religious beliefs or moral convictions, or those coerced to violate those convictions, may themselves experience emotional distress, as well as economic harms such as job loss or rejection from admission into a training program.

There appears to be no empirical data on how previous legislative or regulatory actions to protect conscience rights have affected access to care or health outcomes. In fact, studies have specifically found that there is insufficient evidence to conclude that conscience protections have negative effects on access to care.[345]

Many commenters reasoned that, despite this lack of empirical evidence, the rule would cause an increase in denials of care. For example, one comment cited various statistics on the rates of discrimination against LGBT individuals, but those statistics were general in nature and did not assist the

[345] *See* Chavkin et al., *Conscientious objection and refusal to provide reproductive healthcare: A White Paper examining prevalence, health consequences, and policy responses,* 123 Int'l J. Gynecol. & Obstet. 3 (2013), S41–S56 (''[I]t is difficult to disentangle the impact of conscientious objection when it is one of many barriers to reproductive healthcare. . . . [C]onscientious objection to reproductive health care has yet to be rigorously studied.''); K. Morrell & W. Chavkin, *Conscientious objection to abortion and reproductive healthcare: a review of recent literature and implications for adolescents,* 27 Curr. Opin. Obstet. Gynecol. 5 (2015), 333–338 (''[T]he degree to which conscientious objection has compromised sexual and reproductive healthcare for adolescents is unknown.'').

Department in estimating what degree may be attributable to the lawful exercise of religious beliefs or moral convictions. The comment also identified numerous health disparities between LGBT individuals and non-LGBT individuals, but did not explain the extent to which such disparities are the product of the lawful exercise of religious beliefs or moral convictions. The comment then concluded that ''discrimination and related health disparities facing the LGBT population stand to worsen if health care providers are authorized to refuse to serve LGBT people.''

The same comment attached an amicus brief that cited two studies on how State laws affect health disparities among LGBT populations—one study on States that either did not include sexual orientation as a protected category in its hate crimes statute or did not prohibit employment discrimination on the basis of sexual orientation, and another on States that had constitutional amendments banning gay marriage on the ballot in 2004 and 2005. Neither study provides a reliable basis for inferring an answer to the questions at issue here.

Another comment cited to a 2018 report on anecdotal experiences of discrimination among LGBT individuals in eight States where laws had been passed to protect religious freedom. The report itself includes a citation to one study finding that awareness of legislation prohibiting discrimination on the basis of sexual orientation is associated with a decrease in the rate of such discrimination in interpersonal employment contexts. While analogous, such a finding is not the same as a finding that the awareness of legislation protecting conscience rights increases the rates of discriminatory conduct by people with religious beliefs or moral convictions. The report provides anecdotal accounts of discrimination from LGBT residents of those States. However, the report does not attempt to determine if the laws passed by those States played any causal role in the discrimination experienced by the respondents, *e.g.,* via comparison to LGBT individuals' experiences in States where no such laws had been passed.

Multiple comments provided lists of various incidents in which providers declined to participate in a service or procedure to which they had a religious or moral objection. Such lists offer no suitable data for estimating the impact of this rule.

No comment attempted a detailed description of the actual impact expected from the rule on access to care, health outcomes, and associated concerns.

The Department attempted to quantify the impact of this rule on access to care but determined that there is not enough reliable data, and that the analysis was subject to too many confounding variables, for the Department to arrive at a useful estimate. For instance, the Department is not aware of a source for data on the percentages of providers who have religious beliefs or moral convictions against each particular service or procedure that is the subject of this rule.[346]

Likewise, the Department is not aware of data on the actual rate of providers' exercise of conscientious objections to performing such services or procedures. Some providers who have a religious or moral objection to performing a service or procedure may nonetheless perform it for one reason or another, such as fear of legal reprisal. Others may respond to pressure to violate their consciences by limiting their practices, rather than providing the service to which they object. Commenters who contend the rule will reduce access to care seem to assume all providers with conscientious objections that are not being honored are providing those services anyway, so that the rule will reduce their provision of those services. The Department does not believe that assumption is correct. The Department considered methods for estimating the increase in the rate of such exercise of conscientious objections that may occur as a result of this rule, but determined that no reliable method was available. The Department likewise considered whether providers who, for reasons of religious beliefs or moral convictions, have left the practice of medicine or limited their scope of practice may reenter the field or resume their previous scope of practice, given the rule's expanded enforcement of protections for religious beliefs or moral convictions. If providers who limited their practices because of threats to their consciences expand them because of this rule, those would not be instances of a reduction in the provision of services to which they object, but of an increase in other services. However, the Department was unable to find reliable data on this question, and concluded that no useful quantitative estimate of this impact was feasible.

The impact on health outcomes from the exercise of conscientious objections to particular services and procedures also resisted a useful quantitative estimate. Without data—to inform an estimate of the quantity of such objections that would be attributable this rule, the number of those objections that led to providers offering services to which they object rather than limiting their practices, the number of persons who left or did not enter certain fields or practices altogether because conscience laws were insufficiently enforced, the market effect of providers expanding or moving into different areas because conscience laws are enforced, and the overall resulting availability of access, both to objected-to services and to other health care overall—the Department lacks the predicate for estimating the impact on health outcomes of any change in the availability of services. The analysis on this point is also generally subject to the same confounding factors discussed below regarding the impact of conscientious objections to providing referrals.

The Department expects any decreases in access to care to be outweighed by significant overall increases in access generated by this rule. If the laws that are the subject of this rule are not enforced, many of the exact same people who would face a burden from a denial of access to a particular procedure from a particular doctor or provider would face the potential of receiving no health care at all from that doctor or provider because such providers may limit, or leave, their practices if unable to comply with their religious beliefs or moral convictions. The absence or departure of those providers from the health field does not clearly lead to any increase in other providers who are willing to offer services that are the subject of Federal conscience and anti-discrimination laws, but is more likely to simply diminish the overall availability of health care services. The burden of not being able to receive any health care clearly outweighs the burden of not being able to receive a particular treatment.

For example, after the Department proposed in 2009 to rescind the 2008

[346] For instance, even in the case of abortion, for which some data on the rates of providers' objections actually exists, those rates vary significantly based on the facts and circumstances of the scenario presented, confounding an attempt to produce a single measure of providers' rate of objection to abortion in general. *See* Harris, *et al., Obstetrician-Gynecologists' Objections to and Willingness to Help Patients Obtain an Abortion* 118 OBSTETRICS & GYNECOLOGY 905 (2011) (''These data suggest that ob-gyns also consider contextual factors, including risk of physical harm to the woman by continuing pregnancy (breast cancer, cardiopulmonary disease), the circumstances of the sexual encounter that resulted in pregnancy (rape), the impact abortion may have on pregnancy outcome (selective reduction), the potential for fetal anomaly (diabetes), and the duration of pregnancy (second versus first trimester) . . . Among ob-gyns, support for abortion varies widely depending on the context in which abortion is sought and physician characteristics.'').

rule providing conscience protections for providers, a survey found that 81 percent of faith-based health care professionals working in rural areas and 86 percent of faith-based health care professionals working full-time in service to underserved communities said that they were either ''very'' or ''somewhat'' likely to limit the scope of their practice if the 2008 rule was rescinded.[347] For such providers who did not in fact limit their scope of practice, this rule will help to prevent future situations in which they feel forced to do so. For those who did, this rule provides protections that may induce them to resume their previous scope of practice. In this sense the Department believes the rule will both preserve and expand access to health care generally.

Furthermore, as one academic article observed, ''[P]atients choose not merely particular services, but particular kinds of professionals.'' [348] As noted earlier in this section, a survey of patients found that 88 percent would prefer that their providers share their moral beliefs.[349] Another survey conducted by a former Chair of Bioethics of the National Institutes of Health Clinical Center ''reinforces the existence of patient preference for physicians with shared values . . . [finding] that nearly one-fifth of [cancer] patients surveyed 'thought they would change physicians if their physician told them he or she 'had provided euthansia [sic] or assisted suicide' for other patients.' '' [350] The Department, accordingly, expects this rule, through its recognition of the ''fundamental necessity of conscience protections to ensuring patient access'' for ''patients who want access to physicians of conscience,'' to result in an increase in access to care.[351]

The Effect of the Rule's Protection of Refusals To Refer for Services

As with the analysis in the above factors, there exists some baseline rate of exercise of conscientious objection to referring for a service to which the provider morally objects. A significant percentage of providers believe that they are not obligated to refer for a service to which they morally object.[352] It is reasonable to assume that the rates of exercise of the right not to refer will increase under the rule, but it is difficult to determine by how much. It is likewise difficult to estimate what part of the baseline instances of conscientious objection manifest themselves in providers providing the referrals in violation of their objections, instead of limiting their practices so as to avoid the conflict.

First, it is unclear how many providers understand their existing right to decline to refer, whether grounded in ethics or the law, to be coextensive with the freedom that the rule reflects. For example, a provider who objects to performing sterilizations may feel ethically obligated to inform a patient where vasectomies are locally available—an act that the rule may allow the provider to abstain from—but may not feel obligated to provide the patient any further information about how to obtain that procedure. Research suggests that providers may often draw such a distinction.[353]

It is also difficult to estimate what actual impact the increase in refusals to refer would have. One confounding factor is that the practical effect of a provider's exercise of conscientious objection to providing a referral may vary greatly depending on the particular facts and circumstances of the case. Public knowledge of the availability of certain medical services may be extensive or minimal depending on the procedure. For instance, any pregnant woman is almost certainly aware of the existence and purpose of abortion, and the extensive efforts of pro-choice groups to facilitate women's access to abortion make information about how to obtain an abortion relatively easy to find.[354] So the effect of a provider's refusal to refer for an abortion is mitigated by the patient's own knowledge and the widespread availability of information about abortion access on the internet and elsewhere.

The Change in the Number of Patients Who Delay or Forgo Health Care for Fear of Being Denied a Health Service

As numerous public comments demonstrate, certain minority groups already experience significant health care disparities. Commenters state that negative health outcomes from some demographics are due to fear of discrimination leading to avoidance of seeking health care. However, the Department is not aware of any data establishing what, if any, part of this avoidance phenomenon is attributable to the exercise of conscientious objections protected by this rule or by implementation of the enforcement mechanisms of this rule.

Other Comments on Access to Care

Many of the comments that claimed that the rule would result in more frequent denials of service to patients also argued that the rule is unnecessary because there is no current problem with health care providers being coerced into violating their consciences. These arguments are contradictory. If, under the final rule, a provider exercises a right protected by the rule to decline to perform a service that he had been performing prior to this rule, his previous performances of the service would likely have been contrary to his conscience.

Many commenters observed that, in rural areas, if a provider were to decline on religious or moral grounds to provide a particular service or procedure, there may not be alternative providers within a feasible distance of the patient. The Department does not dispute that patients in rural areas are more likely than patients in urban areas to suffer adverse health outcomes as a result of being denied care. That is why enforcement of Federal conscience and anti-discrimination laws to prevent health care providers from being unlawfully driven out of business,

[347] Christian Medical Association & Freedom2Care summary of polls conducted April, 2009 and May, 2011, *available at https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf.*

[348] M. Bowman & C. Schandevel, *The Harmony between Professional Conscience Rights and Patients' Right of Access,* 6 Phoenix L. Rev. 31 (2012) at 56 (''First, a patient who chooses a pro-life physician is not merely choosing a physician who does not do something. She is choosing a physician who affirmatively practices medicine according to principles that unconditionally value human life, whether in the context of the preborn, the born, the disabled, or the terminally ill . . . Second, patients seek physicians not only for discrete services, but even more so for relationships of trust.'')

[349] Christian Medical Association & Freedom2Care summary of polls conducted April, 2009 and May, 2011, available at *https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf* (''88% of American adults surveyed said it is either 'very' or 'somewhat' important to them that they share a similar set of morals as their doctors, nurses, and other healthcare providers'').

[350] Bowman & Schandevel, citing Ezekiel J. Emanuel et al., *Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients,* Oncologists, and the Public, 347 Lancet 1805, 1808 (1996).

[351] *Id.* at 36.

[352] Combs et al., *Conscientious refusals to refer: findings from a national physician survey,* J. Med. Ethics 2011;37:397–401, 399 (''[43%] of physicians in this present study . . . did not agree that physicians are obligated to make referrals that they believe are immoral.'').

[353] Farr A. Curlin M.D., et al., Religion, Conscience, and Controversial Clinical Practices, NEW ENG. J. MED. 593–600, 593 (2007) available at *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2867473/* (finding that some providers will inform patients of options but not refer for such options) (''Most [providers] also believe that physicians are obligated to present all options (86%) and to refer the patient to another clinician who does not object to the requested procedure (71%)'').

[354] *See, e.g., https://prochoice.org/think-youre-pregnant/find-a-provider/* (first result for Google search of phrase ''find abortion clinic near me'' performed 10/17/18).

especially in rural areas, is of paramount importance. Instead of a decrease in access to a particular procedure from a particular doctor or provider, the residents of a rural area would face the potential of receiving no health care at all from that doctor or provider because such providers may leave the practice if unable to practice medicine according to their religious beliefs or moral convictions. In addition, as discussed in response to comments *supra* at part III.A., some polls show populations in rural communities may be more likely to agree with providers in objecting to certain procedures encompassed by Federal conscience and anti-discrimination laws. This implies that the demand for such services may not exist (or be as great) in such communities, partially offsetting the impact of a higher number of conscientious objections that may be effectuated because of the rule. Persons in urban areas, in contrast, may feel less effect from an increase in conscientious objections because of the relatively greater availability of alternative providers as compared to rural areas.

One commenter noted that individuals whose health insurance does not provide financially adequate coverage for a large enough number of providers may similarly face a lack of alternative providers in the event one provider exercises a conscientious objection to a desired service. The Department regards its analysis herein regarding rural areas to be applicable to such situations as well.

Just as the consequences of denials of care may in some cases be magnified in rural areas, so too may be the consequences of forcing a rural health care provider to violate her conscience. First, the provider may limit her practice or exit the field, harming health care access in a significant way. Second, if the provider continues to practice, the stress of having to violate her conscience may detract from the quality of care the provider delivers to her patients in general, who have no alternative provider.

Additionally, if a provider is in an area where the majority of the population shares the provider's belief system, and if the provider leaves the area due to inability to exercise protected beliefs, many in the community may lose the ability to have a provider with values they share, thus negatively impacting the delivery of health care and the doctor-patient relationship.

5. Analysis of Regulatory Alternatives

The Department carefully considered alternatives to this final rule. The Department determined that no alternative could achieve appropriately robust enforcement of, and respect for, Federal conscience and anti-discrimination laws without unduly burdening covered persons and entities subject to those laws and this rule. The following alternatives represent the major approaches the Department considered, including how burden reduction was a consideration in constructing this rule.

The Department considered preserving the status quo by maintaining 45 CFR part 88 without change from the 2011 Rule. Under this approach, the Department would largely defer to the States to enforce their respective conscience laws or to enact new laws to fill gaps in the landscape of Federal and State conscience protection and associated anti-discrimination rights and their enforcement, continue with the current inadequate enforcement scheme, and provide no meaningful enforcement of the conscience and associated anti-discrimination laws that were not part of the 2011 Rule. The Department received comments advocating this approach since, in commenters' views, State law, in conjunction with Federal law, already provides adequate accommodation of religious beliefs. Furthermore, some commenters stated that the stringent protections for conscience established by the statutes implemented by this rule are in tension with State nondiscrimination laws, State pharmaceutical dispensing laws, and State immunization laws that offer employers greater leeway in handling situations in which an employee asserts a conscientious objection.[355] As stated elsewhere in response to similar comments, the Department disagrees with these arguments. As described above and further in the rule's Federalism analysis, to eliminate or reduce any tension between this rule's application of Federal statutes and State law, the final rule narrows the scope of the definitions of ''discrimination'' and ''referral'' in § 88.2.

The Department also disagrees that maintaining the status quo is preferable to this rule. Deference to States would perpetuate the current circumstances necessitating Federal regulation, which include (1) inadequate to non-existent Federal government frameworks to enforce Federal conscience and anti-discrimination laws and (2) inadequate information and understanding about the obligations of regulated persons and entities and the rights of persons, entities, and health care entities under the Federal conscience and anti-discrimination laws. State action cannot correct these deficiencies at the Federal level. Furthermore, the Department could not, in good faith, choose to rely on States to promote conscience protection policies, knowing that some States have adopted laws that are inconsistent with, or have otherwise expressed indifference towards, the rights protected by the laws that part 88 (as written in the 2011 Rule) implements—the Weldon, Church, and Coats-Snowe Amendments.[356]

Additionally, as noted more extensively in the preamble's summary of regulatory history, *supra* at part I, many commenters have pointed out the mutually reinforcing inadequate circumstances of the status quo contribute to the critical need for this final rule, including a conspicuously minimalistic regulatory scheme (compared to regulations implementing other civil rights laws OCR enforces); a lack of recognition by courts of a private right of action under certain Federal conscience and anti-discrimination laws; [357] and hostility to conscience protections in some portion of the population and in certain State and local governments. Maintaining the status quo leaves a gap where HHS has a responsibility to coordinate compliance with, and enforcement of, Federal conscience protection and anti-discrimination laws but does not have the regulatory scheme to accomplish that goal. The Department consequently promulgates this final rule to eliminate that gap.

The Department considered maintaining the status quo, but dramatically increasing its outreach. Numerous commenters asserted the strong need for outreach to combat bias and animus in the health care sector against individuals with religious beliefs or moral convictions, to raise awareness of the conscience rights of individuals, entities, and health care entities, and to clarify the legal obligations of regulated persons and entities. Commenters suggested a range

[355] These comments paralleled the concerns, described *supra* at part III.B, raised by commenters who argued that this rule conflicts with other Federal statutes like Title VII of the Civil Rights Act of 1964.

[356] *See supra* at part II.A (discussing laws and policies that some States have adopted).

[357] *See, e.g., Cenzon-DeCarlo* v. *Mount Sinai Hospital,* 626 F.3d 695 (2d Cir. 2010); *Hellwege* v. *Tampa Family Health Centers,* 103 F. Supp. 3d 1303 (M.D. Fla. 2015); *National Institute of Family and Life Advocates, et al.* v. *Rauner,* No. 3:16–cv–50310, at 4 (N.D. Ill. July 19, 2017).

of ideas, including that the Department publish educational materials for academic medical institutions to educate students about their protected conscience rights and the obligation of regulated entities to comply with Federal conscience and anti-discrimination laws; that HHS partner with State institutions regulating health professions; and that HHS create an advisory team with diverse members to develop a plan for extensive outreach to combat ignorance about Federal conscience and anti-discrimination laws.

The Department remains committed to robust outreach. Outreach has tremendous benefits to clarify legal obligations, raise awareness of OCR, and elevate awareness of the importance of conscience protections generally. The Department, however, agrees with one commenter who noted that, although outreach is important, it is insufficient without an enforceable rule to uphold the substantive protections under Federal law. As with every other civil rights law, outreach without adequate enforcement mechanisms is not enough to ensure appropriate compliance.

The Department considered a regulatory scheme that was more prescriptive than this rule by requiring all recipients and sub-recipients to establish policies and procedures for accommodating workforce members who objected to certain services based on moral convictions or religious beliefs; to address certain substantive elements in their policies and procedures; and to require the dissemination of information to workforce members about Federal conscience and anti-discrimination laws, this rule, or the recipient's and sub-recipient's policies and procedures. The burden under this option across 502,899 entities (the mid-point of the range shown in supra at Table 2) is the labor of a lawyer's time (3 hours) and an executive's time (1 hour). Using the mean hourly wages for these occupations adjusted upward for benefits and overhead, the annual average burden would be $297 million.[358]

The Department rejected this alternative, but estimates *supra* at part IV.C.3.ii that five percent of entities in year one and 0.5 percent of entities annually in years two through five would voluntarily update policies and procedures or disseminate them to staff as a by-product of assuring and certifying compliance with Federal conscience and anti-discrimination laws and this rule.

As discussed above, the Department considered requiring recipients to post notices of nondiscrimination in various physical locations and online, but has chosen to make the notice provisions voluntary, in part to reduce burden. The final rule allows recipients and sub-recipients flexibility to decide what measures will best ensure compliance with Federal conscience and anti-discrimination laws and this rule, while providing for vigorous enforcement in cases of violation. Recipients and sub-recipients are better positioned to decide whether organization-wide action is necessary, and if so, what extent, content, and manner of that action is appropriate to ensure compliance. This approach allows recipients and sub-recipients to tailor appropriate organization-wide action based on their type, the populations they serve, their size, the scope of their workforce members likely to exercise protected rights under the Federal conscience and anti-discrimination laws and this rule, and other relevant considerations. This rule, therefore, permits recipient employers to establish their own policies and procedures for how they will handle individuals' objections to certain procedures, such as abortion, sterilization, or assisted suicide, and recognizes the availability of appropriate accommodation procedures. In addition, this rule permits recipient employers who do have institution-wide objections to performing certain procedures, such as sterilization, but that do not object to referring for such procedures, to establish referral systems with nearby institutions that do not have objections to such procedures to facilitate the delivery of the services or programs.

D. Executive Order 13771

Executive Order 13771 (January 30, 2017) requires that the costs associated with significant new regulations ''to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' The Department believes that this final rule is a significant regulatory action as defined by section 3(f) of Executive Order 12866. This rule is also considered a regulatory action under Executive Order 13771. Excluding any negative externalities attributed to this rule in the form of health outcomes or other effects not compensated by positive health or other externalities from protecting conscience rights, the Department estimates that this rule will generate $148.2 million in annualized costs at a 7 percent discount rate, discounted relative to year 2016, over a perpetual time horizon.

One commenter argued that the final rule violates Executive Order 13771 because it imposes costs but does not identify what other burdens imposed by other regulations are being eliminated. Although each agency must identify offsetting deregulatory actions for each new regulatory burden, OMB does not interpret Executive Order 13771 to require each regulation that imposes costs to cite the particular deregulatory actions that offset that particular burden.[359]

E. Regulatory Flexibility Act

HHS has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612). The RFA requires an agency to describe the impact of a rulemaking on small entities by providing an initial regulatory flexibility analysis unless the agency expects that the rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact of revenue on at least five percent of small entities.

Based on its examination, the Department has concluded that this rule does not have a significant economic impact on a substantial number of small entities. The entities that would be affected by this final rule, in industries described in detail in the RIA, are considered small by virtue of either nonprofit status or having revenues of less than between $7.5 million and $38.5 million in average annual revenue, with the threshold varying by

[358] Product of weighted mean hourly wage of $147.60 per hour × 4 hours × 502,899 entities.

[359] Office of Management & Budget, Guidance Implementing Executive Order 13771, Titled Reducing Regulation and Controlling Regulatory Costs, at 16 (Apr. 5, 2017), *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf* (stating in the answer to question 37 that ''[w]hile each **Federal Register** notice should identify whether the regulation is an E.O. 13771 regulatory action, there is no need to discuss specific offsetting E.O. 13771 deregulatory actions within the same **Federal Register** entry.'').

industry.[360] Persons and States are not included in the definition of a small entity. The Department assumes that most of the entities affected meet the threshold of a small entity.

Although this final rule will apply to and, thus, affect small entities, this rule's per-entity effects are relatively small. The Department estimates that this rule would impose an average cost of $778 per entity in the first year of compliance [361] and about $325.30 per year in years two through five.[362] Furthermore, these costs would generally be proportional to the size of an entity, so that the smallest affected entities will face lower average costs. Given the thresholds discussed in the preceding paragraphs, the average costs are below those required to have a significant impact on a substantial number of small entities, within the meaning of the RFA.

Furthermore, the rule attempts to minimize costs imposed on small entities. For example, the assurance and certification requirements in § 88.4 contain exceptions to relieve many small entities of the requirement to submit an assurance and certification. Approximately 70 percent of recipients are exempted from the assurance and certification requirement, assuming that those exempted do not receive HHS funding through a non-exempt program.[363] Given the magnitude and type of entities granted the exception, § 88.4 should not be understood as unduly burdening small entities subject to the rule.

The Department has further committed to leveraging existing grant, contract, and other Departmental forms where possible to implement § 88.4, rather than create additional, separate forms for recipients to sign. Similarly, § 88.5 no longer requires recipients to provide notices of conscience rights, but incentivizes recipients to voluntarily provide such notices. In light of this determination, the Secretary certifies that this rule will not result in a significant impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act

The Department similarly concludes that the requirements of the Unfunded Mandates Reform Act of 1995 are not triggered by this final rule. Section 202(a) of that Act requires the Department to prepare a written statement, including an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $150 million, using the most current (2016) Implicit Price Deflator for the Gross Domestic Product. As discussed in this RIA, this rule will not result in an expenditure in any year that meets or exceeds that amount with regard to State, local, or tribal governments, but will exceed that amount with regard to the private sector. An in-depth analysis of the rule with respect to State and local governments specifically appears in the following section of this RIA regarding Executive Order 13132 (Federalism).

G. Executive Order 13132—Federalism; Executive Order 13175—Impact on Tribal Entities

Federalism

The Secretary has determined that this final rule comports with Executive Order 13132.[364] Executive Order 13132 aims to ''guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution . . . [and] ensure that the principles of federalism . . . guide the executive departments and agencies in the formulation and implementation of policies.'' [365] Some of the Federal laws that this rule implements and enforces, such as the Weldon and Coats-Snowe Amendments, directly regulate States and local governments that receive Federal funding by conditioning the receipt of such funding on the governments' commitments to refrain from discrimination on certain bases or by imposing certain requirements on States and local governments that receive Federal funding. This impact, however, is a result of the statutory prohibitions and requirements themselves, and are not due to the mechanisms provided by this rule.

Under the Supremacy and Spending Clauses of the Constitution, States and their political subdivisions are subject to Acts of Congress,[366] and Federal conscience and anti-discrimination laws are no exception. This rule holds States and local governments accountable for compliance with these laws by setting forth mechanisms for OCR investigation and HHS enforcement related to those requirements. The rule does not change the substantive conscience protections or anti-discrimination requirements of these statutes.

The Department received comments arguing that the enforcement of this rule through § 88.7 could infringe on State sovereignty, in violation of the limits of the Spending Clause power afforded by the U.S. Constitution to Congress. The Federal government presumes the constitutionality of statutes that Congress enacts. Congress has exercised the broad authority afforded to it under the Spending Clause to attach clear conditions on Federal funds to secure conscience protection and associated anti-discrimination rights. In cases of violation of the Federal conscience and anti-discrimination laws, the Department intends to interpret and apply the remedies that § 88.7 sets forth in a manner consistent with the particular Federal law(s) at issue and the U.S. Constitution, and, as discussed in response to earlier comments, will comply with relevant Supreme Court precedents concerning federalism.[367]

Some commenters argued that the rule implicates the requirements of Executive Order 13132 and unconstitutionally impedes the ability of States to exercise power in areas traditionally reserved to them, such as health, safety, and welfare. Commenters also raised concerns that the rule may inhibit States from implementing their own conscience protections. The Department disagrees with these concerns. The Department promulgates this rule under longstanding Federal laws that leave ample room for State activity. States are free to enact their own conscience protection and anti-discrimination laws that consider their own respective needs, populations, and prerogatives. Indeed, all fifty States have some protections in place for conscientious objectors to certain health or medical services and several provisions of this rule explicitly apply to reinforce and respect State conscience protections.[368] States are

[360] U.S. Small Business Administration, Table of Small Business Size Standards Marched to North American Industry Classification System Codes (Oct. 1, 2017), *https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf* (identifying the size standards by NAICS code for the health care and social service industries).

[361] Result of $391.5 million in first year costs to non-HHS entities divided by 502,899 entities.

[362] Result of $163.6 million annually to non-HHS entities in years two through five divided by 502,899 entities.

[363] The average between the lower-bound (267,134) and upper-bound (415,666) of recipients exempted is 341,400 recipients, which represents 68 percent of the estimated total 500,290 recipients of the rule (excluding the estimated 2,609 counties that for the purpose of this rule are estimated to be sub-recipients).

[364] E.O. 13132, 64 FR 43255 (Aug. 4, 1999).

[365] *Id.*

[366] *Id.* section 2(d).

[367] *See supra* at part III.B (section-by-section analysis for § 88.7) and part I.B (this regulation's history) for further discussion of this matter.

[368] *See* Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare*

free to experiment with various approaches to promote respect of, and tolerance for, the exercise of conscience rights, and this final rule respects that prerogative. States are also free to reject Federal funding if they object to conditions required by any of the laws that are the subject of this rule.

Section 88.8 of the rule makes clear that the rule is not intended to interfere with the operation of State law. For State laws equally or more protective of religious freedom and moral convictions than this rule, § 88.8 of this rule states that nothing in the rule ''shall be construed to preempt'' such State or local law. Section 88.8 also declares that nothing in the rule ''shall be construed to narrow the meaning or application of any State . . . law protecting free exercise of religious beliefs or moral convictions.''

Some statutes that the rule implements, such as 42 U.S.C. 1396s(c)(2)(B)(ii), *require* providers to comply ''with applicable State law, including any law relating to any religious or other exemption'' as a condition of participation in the program that the statute authorizes (in this example, the Federal pediatric vaccine program). Other laws that this rule implements, such as 42 U.S.C. 280g–1(d), clarify that Federal assistance for newborn and infant hearing screening programs do not preempt or prohibit any State law protections for parents to assert religious objections to such screenings. Similarly, 42 U.S.C. 1396f clarifies that nothing requires a State to compel a person to undergo medical screenings, examination, diagnosis, treatment, health care or services if a person objects on religious grounds, with limited exceptions.

This rule's requirements and prohibitions do not impose substantial direct effects on States and their political subdivisions, modify the relationship between the Federal government and the States, or alter the distribution of power and responsibilities among the various levels of government.[369]

Some commenters argued that this rule, or the statutes that the rule implements, conflict with State and local laws regarding student and health provider immunizations, mandated provision of abortion coverage, employer protections, counseling related to assisted suicide, or employers being able to accommodate objectors with alternative arrangements. These comments paralleled the concerns already addressed above. In short, the Department finalizes the rule to recognize forms of accommodation and to eliminate or reduce such tension between applicable statutes or between this final rule and State laws. Accordingly, the final rule narrows the scope of the definitions of ''discrimination'' and ''referral'' in § 88.2.

The impact of § 88.4 is minimal in terms of the added labor costs for State and local government staff to assure and certify compliance.[370] Additionally, the rule relies on enforcement mechanisms already available to HHS for grants and other forms of financial assistance.

In light of the above, the rule cannot be properly understood to impose substantial direct effects on States or their political subdivisions, their relationship with the Federal Government, or the distribution of power among the various levels of government.

One comment noted that it ''does not threaten principles of federalism [to] requir[e] respect for constitutionally-protected conscience rights as a condition of receiving Federal funds.'' The Department agrees. The Department has not identified any Federal laws or jurisprudence that indicates that merely implementing and enforcing Federal laws as written violates constitutional principles of federalism.

Impact on Tribal Entities

One comment stated that the Department would be required to engage in tribal consultation regarding the rule as required under Executive Order 13175. However, because the final rule removes the requirement in the proposed § 88.3(p)(1)(iii) that certain federally recognized Indian tribes or tribal organizations and urban Indian organizations comply with sections 88.4 and 88.6 of the rule, the Department believes that the rule does not have tribal implications as defined in Executive Order 13175, and that tribal consultation regarding the rule was, therefore, not necessary.

H. Congressional Review Act

The Congressional Review Act defines a ''major rule'' as ''any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.'' 5 U.S.C. 804(2). Based on the analysis of this final rule under Executive Order 12866, the Office of Management and Budget has determined that this rule is a major rule for purposes of the Congressional Review Act.

I. Assessment of Federal Regulation and Policies on Families

In the proposed rule, the Department included a discussion of section 654 of the Treasury and General Government Appropriations Act of 1999, Public Law 105–277, sec. 654, 112 Stat. 2681 (1998) as amended by Public Law 108–271, sec. 654, 118 Stat. 814 (2004), which required Federal departments and agencies to determine whether a policy or regulation could affect family well-being. These provisions are codified as a ''note'' to 5 U.S.C. 601. Because Congress did not renew these requirements in the most recent appropriations act applicable to the Department,[371] the Department believes it is not obligated to conduct an analysis of potential impact on family well-being before finalizing regulations. Additionally, OMB Circular A–4 does not require such an analysis. Nevertheless, out of an abundance of caution, the Department conducts such an analysis below.

Section 601 (note) of 5 U.S.C. required agencies to assess whether a regulatory action (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) if the regulatory action which financially impacts families, is justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior

Professionals, 49 Ariz. St. L.J. 549, 575–76, 587–600 (2017) (summarizing State laws).

[369] E.O. 13132, section 1(a). Executive Order 13132 requires an agency to meet certain requirements when it promulgates a rule with ''policies that have federalism implications.'' *Id.* sections 2–3, 6(b)–(c) (identifying federalism principles, policymaking criteria, and consultation requirements).

[370] *See supra* at part IV.C.2.vi of this RIA estimating the rule's burden.

[371] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115–245, 132 Stat. 2981 (2018).

and personal responsibility of youth and the norms of society.

The Department received comments stating that it did not adequately assess the impact on families in the proposed rule and reached an incorrect conclusion in determining that it is unlikely that this rule will negatively impact factors (1)–(4), with respect to the stability of the family, parental authority, or the disposable income or poverty of families and children. Other comments referenced concerns about how delays or refusals in treatment or in the transmission of information could affect factor (5): The emotional and financial well-being of families. The Department did not receive comments addressing factors (6) or (7). In response to these comments, the Department notes that these concerns do not constitute an impact on the well-being of the family within the meaning of 5 U.S.C. 601 (note) and that, in any event, the objections are to the underlying statutes that are the subject of the rule, not the mechanisms provided by the rule itself. With regard to factor (5), the prospect of a person losing their job, thus affecting the emotional and financial well-being of their family, is greater if conscience laws are not enforced as people of faith and moral conviction risk being driven out of the health care field as discussed above. Further discussion on the impact of this rule on patients and individuals can be found in part IV.C.4 (Estimated Benefits).

As the Department noted in the proposed rule, the action taken in this rule cannot be carried out by State or local governments or by the family on their own (factor (6)) because the rule pertains to enforcement of certain Federal laws. Additionally, by protecting parents' ability to assert conscience rights on behalf of their children, the rule clearly enhances parental authority under factor (2). None of the rule's provisions impact factors (1), (3)–(5), or (7) to the degree contemplated by 5 U.S.C. 601 (note). Accordingly, this rule will not negatively affect family well-being within the meaning of 5 U.S.C. 601 (note) in the event such provisions apply.

J. Paperwork Reduction Act

This final rule requires new collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Congress enacted the Paperwork Reduction Act of 1995 to ''maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government'' and to minimize the burden of this collection. 44 U.S.C. 3501(2). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, record-keeping, monitoring, posting, labeling, and other similar actions. The Department sought comments regarding the burden estimates and the information collections generally. Some comments are discussed *supra* at part IV.C.3.ii–vi and others discussed in the following sections. The collections of information required by this final rule relate to §§ 88.4 (Assurance and Certification), 88.5 (Voluntary Posting of Notice of Rights), and 88.6(d) (Compliance Requirements).

1. Information Collection for § 88.4 (Assurance and Certification)

(i) Summary of the Collection of Information

This final rule requires each recipient (or applicant to become a recipient), with limited exceptions, to assure and certify compliance with Federal conscience and anti-discrimination laws. Specifically, § 88.4(a)(1) and (2) requires each recipient or applicant to include in its application for Federal funds, or accompany its application with, an assurance and a certification that it will operate applicable projects or programs in compliance with applicable Federal conscience and anti-discrimination laws and this rule.

Operationalizing the Assurance of Compliance Requirement

To operationalize the requirement in § 88.4(a)(1) for a recipient or applicant to sign an assurance of compliance, the Department is seeking clearance under the PRA to update the HHS–690 form, which is entitled ''Assurance of Compliance'' [372] and is described in the section-by-section analysis of the preamble for § 88.4. The new language that the Department is adding to the HHS–690 form identifies the major Federal conscience and anti-discrimination laws by their popular titles and their U.S. Code provisions (if codified) and directs the reader to OCR's Conscience and Religious Freedom web page for a full listing of the laws.

Operationalizing the Certification of Compliance Requirement

In response to public comments that encouraged the Department to use existing forms, the Department explored operationalizing the certification of compliance requirement in § 88.4(a)(2) by updating the HHS form 5161–1, but this form is only used by two HHS components rather than by all or most HHS operating or staff divisions. The Department also explored updating the Assurances for Non-Construction Programs (SF–424B), which, despite its name, enables the authorized representative of the applicant to certify up to nineteen paragraphs of agency and program-specific laws and regulations, such as housing, environmental, and labor laws and regulations.[373] Pursuant to an OMB directive, ''[e]ffective January 1, 2019, the SF–424B will become optional and agencies shall make plans to phase out use in Funding Opportunity Announcements.'' [374] Given this directive, the Department did not further explore updating the SF–424B.

The Department is seeking PRA clearance to operationalize the certification of compliance requirement during calendar year 2019 through the existing signature block of the government-wide Application for Federal Assistance (SF–424) [375] or, for research or related grants, through the Application for Federal Assistance for Research and Related (R&R) Series (SF–424 R&R).[376] The signature block for both applications contains the following statement:

> By signing this application, I certify (1) to the statements contained in the list of certifications ** and (2) that the statements herein are true, complete and accurate to the best of my knowledge. I also provide the required assurances ** and agree to comply with any resulting terms if I accept an award. I am aware that any false, fictitious, or fraudulent statements or claims may subject me to criminal, civil, or administrative penalties. (U.S. Code, Title 18, Section 1001).

** The list of certifications and assurances, or an internet site where you may obtain this list, is contained in the announcement or agency specific instructions.

In calendar year 2020 and the outyears, the Department is seeking PRA

[372] U.S. Dep't of Health & Human Servs., Assurance of Compliance, HHS 690, *https://www.hhs.gov/sites/default/files/hhs-690.pdf.*

[373] Assurances for Non-Construction Programs, SF–424B, (OMB #4040–0007) *https://apply07.grants.gov/apply/forms/sample/SF424B-V1.1.pdf* (last visited Apr. 11, 2019).

[374] Exec. Office of the President, Memorandum from Mick Mulvaney, Dir., Office of Management & Budget to Heads of Executive Departments and Agencies, Strategies to Reduce Grant Recipient Reporting Burden, at 2 (Sept. 5, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-24.pdf.*

[375] Application for Financial Assistance, SF–424, (OMB # 4040–0004), *https://apply07.grants.gov/apply/forms/sample/SF424_2_1-V2.1.pdf* (last visited Apr. 11, 2019).

[376] Application for Financial Assistance, SF–424 (R&R), (OMB # 4040–0001), *https://apply07.grants.gov/apply/forms/sample/RR_SF424_2_0-V2.0.pdf* (last visited Apr. 11, 2019).

clearance to operationalize the certification of compliance requirement through the government-wide System for Award Management (SAM) [377] because this system, pursuant to an OMB directive, ''will become the central repository for common government-wide certifications and representations required of Federal grants recipients.'' [378] The certifications and representations through SAM replace the government-wide assurances contained in the Assurances for Non-Construction Programs (SF–424B).[379]

In submitting the general certifications and representations through SAM,[380] the authorized representative certifies to several statements, two of which the Department interprets as operationalizing § 88.4(b).[381] First, the authorized representative certifies that it ''[w]ill comply with U.S. statutory and public policy requirements which prohibit discrimination, including but not limited to[]'' certain Federal civil rights statutes.[382] The Federal conscience and anti-discrimination laws are not listed because the general certifications and representations identified in SAM are government-wide, rather than agency or multi-agency specific. However, the Department construes the non-exhaustive list as incorporating the Federal conscience and anti-discrimination laws, as applicable, that the final rule implements.

Another statement conveys that the authorized representative certifies that it ''[w]ill comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies government financial assistance awards and any financial assistance project covered by this certification document.'' [383] The Department construes this catch-all statement as incorporating the Federal conscience and anti-discrimination laws, as applicable, and the final rule.

(ii) Need for Information

Requiring certain recipients and applicants to assure and certify compliance serves two purposes. First, through the act of reading and reviewing the statutory requirements to which recipients or applicants assure and certify compliance, recipients would be apprised of their obligations under the applicable Federal conscience and anti-discrimination laws and this rule. Second, a recipient's or applicant's awareness of its obligations would increase the likelihood that it would comply with such laws and, consequently, afford entities and individuals protection of their conscience rights and protection from coercion or discrimination.

In the proposed rule, the Department requested comment on whether the collection of information is necessary for the proper performance of the Department's functions to enforce Federal laws on which Federal funding is conditioned. At least one commenter encouraged the Department to add the assurance and certification requirements in § 88.4 because of the ''surge in harassment and coercion of medical providers of faith.'' Other commenters stated that assurance and certification was unnecessary because recipients already must certify compliance with Federal law upon the receipt of Federal funds.

This collection of information facilitates the Department's obligation to ensure that the Federal financial assistance or other Federal funds that the Department awards are used in a manner compliant with Federal conscience and anti-discrimination laws and the final rule. The Department's administration of a requirement for an entity at the time of application or reapplication to assure and certify compliance with Federal conscience and anti-discrimination laws and the final rule demonstrates that the person or entity was aware of its obligations under those laws and the rule.

In addition, HHS has the authority to place terms and conditions consistent with those statutes in any instrument HHS issues or to which it is a party (*e.g.,* grants, contracts or other HHS instruments). A Department component extending an award must communicate and incorporate statutory and public policy requirements and obligate the recipient to comply with Federal statues and ''public policy requirements, including . . . those . . . prohibiting discrimination.'' [384] More specifically, the Department component ''must communicate . . . all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award.'' [385] The Departmental component may require a recipient ''to submit certifications and representations required by Federal statutes, or regulations . . .'' [386]

(iii) Use of Information

The Department and its components awarding Federal funds and OCR will use the signed assurance and certification as documentation of (1) a recipient's or applicant's awareness of its obligations under the Federal conscience and anti-discrimination laws and this rule, and (2) a recipient's or applicant's binding agreement to abide by such obligations. This use would most likely occur during an OCR investigation of the recipient's compliance with Federal conscience and anti-discrimination laws and this rule, and as part of an entity's record keeping obligations under this rule.

(iv) Description of the Respondents

The respondents are applicants or recipients for Federal financial assistance or Federal funds from the Department as set forth in § 88.3, which identifies the applicability of this rule for each of the underlying statutes that would be implemented and enforced. Respondents include hospitals, research institutions, health professions training programs, qualified health plan issuers, Health Insurance Marketplaces, home health agencies, community mental health centers, and skilled nursing facilities.

(v) Number of Respondents

The Department estimates the number of respondents at 158,890 persons or

[377] U.S. Gen. Servs. Admin., System for Award Management, *Home, https://www.sam.gov/SAM/pages/public/index.jsf* (last visited Apr. 11, 2019).

[378] Exec. Office of the President, Memorandum from Mick Mulvaney, Dir., Office of Management & Budget to Heads of Executive Departments and Agencies, Strategies to Reduce Grant Recipient Reporting Burden, at 2 (Sept. 5, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-24.pdf.*

[379] *See id.* (''[R]egistration in SAM is required for eligibility for a Federal award and registration must be updated annually . . . . Federal agencies will use SAM information to comply with award requirements and avoid increased burden and costs of separate requests for such information, unless the recipient fails to meet a Federal award requirement, or there is a need to make updates to their SAM registration for other purposes.'').

[380] U.S. Gen. Servs. Admin., System for Award Management, SAM Release Notes Build 2019–02–01, at 3 (Feb. 2, 2019), *https://www.sam.gov/SAM/transcript/SAM_Release_Notes_2019_02_01.pdf* (describing under ''enhancements'' that SAM has ''a new government-wide Financial Assistance Representations and Certifications module within the SAM entity management registration'' and ''[a]ll non-federal registrants in SAM will be required to certify to the new Financial Assistance Reps & Certs as part of their registration'').

[381] The certifications and representations are not publicly available until an individual creates an account. The list of certifications and representations were obtained from staff at *Grants.gov* on March 19, 2019, and are on file with OCR.

[382] Financial Assistance General Certifications and Representations, at 2, para. 9 (on file with OCR).

[383] Financial Assistance General Certifications and Representations, at 1, para. 7 (on file with OCR).

[384] 45 CFR 75.300(a).

[385] *Id.*

[386] *Id.* at § 75.208.

entities, which is the average between the low (122,558) and high (195,222) estimates of entities required to sign an assurance or a certification. These figures appear *supra* at Table 3, part IV.C.2.iv.A. Respondents are a subset of the recipients because § 88.4(c)(1) through (4) excludes certain categories of recipients. The rule excludes physicians, as defined in 42 U.S.C. 1395x(r), physician offices, other health care practitioners or pharmacists who are recipients in the form of reimbursements for services provided to beneficiaries under Medicare Part B. *See* § 88.4(c)(1). The rule also exempts recipients of certain grant programs administered by the Administration for Children and Families or the Administration for Community Living when the program's purpose is unrelated to health care and certain types of research, does not involve health care providers, and does not involve any significant likelihood of referral for the provision of health care. *See* § 88.4(c)(2) and (3). Finally, this final rule excludes Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act. *See* § 88.4(c)(4).

(vi) Burden of Response

The Paperwork Reduction Act burden is the opportunity cost of recipient staff time to review the assurance and certification language as well as the requirements of the underlying Federal conscience and anti-discrimination laws referenced or incorporated. The methods that the Department uses are outlined *supra* at part IV.C.3.ii, and the mean hourly wage is adjusted downward to exclude benefits and overhead.

The labor cost is a function of a lawyer spending 3 hours reviewing the assurance and certification and an executive spending one hour to review and sign, as § 88.4(b)(2) requires a signature by an individual authorized to bind the recipient. The weighted mean hourly wage (not including benefits and overhead) of these two occupations is $73.80 per hour.[387] The labor cost is $46.9 million each year ($73.80 per hour × 4 hours × 158,890 entities).[388]

The Department asked for public comment on the information collection under § 88.4. Several specific questions that the Department posed received no comments:

- Whether the exception for Indian Tribes and tribal Organizations in proposed 45 CFR 88.4(c)(vi) avoids ''tribal implications'' and does not ''impose substantial direct compliance costs on Indian Tribal governments'' as stated in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, sec. 5(b) (Nov. 9, 2000);
- Whether assuring compliance with the Federal conscience protection and associated anti-discrimination statutes would constitute a burden exempt from the Paperwork Reduction Act as a usual and customary business practice incurred by recipients during the ordinary course of business;
- How the quality, utility, and clarity of the information to be collected may be enhanced; and
- How the manner of compliance with the assurance and certification requirements could be improved, including through use of automated collection techniques or other forms of information technology.

The Department received public comments expressing concern with the possible burden on health care providers resulting from § 88.4, which is discussed *supra* at part IV.C.3.ii. In addition, as explained in the summary of this Paperwork Reduction Act analysis, the Department is leveraging existing grant, contract, and other Departmental forms and government-wide systems, consistent with OMB's government-wide effort to reduce recipient burden.[389]

2. *Information Collection for § 88.5 (Notice)*

(i) Summary of the Collection of Information

Under this rule as finalized, § 88.5 does not mandate the provision of notice, but rather incentivizes recipients and Department components to provide notice concerning Federal conscience and anti-discrimination laws. The rule intends to accomplish this goal by considering a recipient's or a Department component's posting of the notice as non-dispositive evidence of compliance with the rule when OCR investigates or initiates a compliance review of a recipient or Department component. If recipients voluntarily provide notice to implement § 88.5, recipients are encouraged to use the pre-written notice in appendix A. The recipient is otherwise free to draft its own notices tailored to its specific circumstances and applicable laws under the rule.

(ii) Need for Information

The Department incentivizes recipients and Department components to provide notice of rights because notice serves three primary purposes. First, individuals become apprised of their rights under applicable Federal conscience and anti-discrimination laws, including the right to file a complaint with HHS OCR. Second, an individual's awareness of his or her rights increases the likelihood that the individual will exercise those rights. Third, recipients and their managers and employees will be more likely to be reminded, and be made aware, of their own obligations under these laws.

(iii) Use of Information

Individuals, entities, and health care entities will use the information to increase their awareness of their rights and file complaints with OCR if they believe their rights have been violated. Entities required to comply will have an increased likelihood of understanding their obligations to thus act accordingly to fulfill them. During OCR investigation or compliance review of a recipient, OCR will consider as non-dispositive evidence of compliance whether and how the recipient posted a notice according to § 88.5.

(iv) Description of the Respondents

The respondents are recipients as defined in this rule at § 88.2. Respondents include, but are not limited to, States, hospitals, research institutions, and skilled nursing facilities.

(v) Number of Respondents

The number of respondents is estimated at 335,327 recipients at the establishment-level in year one and 75 percent of that amount in years two through five (*i.e.,* 251,495 establishments). This estimate represents the average between the lower and upper-bound estimates of how many recipient establishments will voluntarily post notices through one of more of the methods in § 88.5 in years one and annually in years two through five. A subset of respondents, about 139,615 recipients at the firm level, will likely modify the pre-written notice in appendix A.

(vi) Burden of Response

Even though the notice provision of the final rule is entirely voluntary, the Department expects that some segment

[387] Sum of ($67.25 × .75) and ($93.44 × .25).

[388] This total differs from the burden in the RIA because a fully-loaded wage that is adjusted upwards for benefits and overhead must be used in the RIA.

[389] Exec. Office of the President, Memorandum from Mick Mulvaney, Dir., Office of Management & Budget to Heads of Executive Departments and Agencies, Strategies to Reduce Grant Recipient Reporting Burden, at 2 (Sept. 5, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-24.pdf.*

of the recipients and Department components that this rule regulates will choose to post the notice through one of the methods specified. The burden is mix of labor, materials, and in some cases, postage costs. The methods and assumptions that the Department uses are outlined *supra* at part IV.C.3.iii, and the mean hourly wage is adjusted downward to exclude benefits and overhead. Unlike the burden estimated in the RIA of the rule, the PRA burden associated with § 88.5 excludes the costs of posting the notice for those entities that post it verbatim because the Department is supplying the language for the notice for the purpose of disclosure to the public, under 5 CFR 1320.3(c)(2).

Assuming that 139,615 recipients at the firm level alter the text of the notice in appendix A, these recipients will, on average, bear a minimal opportunity cost of ⅓ hour of a lawyer's time for drafting and ten minutes of an executive's time to provide final sign-off. The weighted mean hourly wage (excluding benefits and overhead) of these two occupations is $75.89 per hour. The one-time labor cost is $5.3 million in the first year ($75.89 per hour × 0.5 hours × 139,615 recipients).

The assumptions regarding the timing of providing notices of rights and the various uncertainties inherent in the implementation of § 88.5 described in detail in the RIA *supra* at part IV.C.3.iii apply to this analysis, too, such as the number of locations where notices are customarily posted, and the length of time it may take an administrative assistant or web developer to perform their respective functions.

(vii) Burden for Voluntary Posting in Physical Locations

The Department estimates that it will take ⅓ of an hour for an administrative assistant to print notice(s) and post them in physical locations of the establishment where notices are customarily posted. The 139,615 recipients at the firm level estimated to alter the notice are associated with 180,331 establishments. Assuming that about 180,331 facilities at the establishment level choose voluntarily to post notices in physical locations, the estimated labor cost is $1.2 million (⅓ hour × $19.39 per hour × 180,331 establishments).[390] The cost to post 5 notices across all establishments would be $45,083 (180,331 establishments × $.05 per page (paper and ink) × 5 pages). The total labor and materials costs associated with voluntary posting in physical locations by 180,331 establishments is $1.2 million ($1.2 million in labor costs and $45,083 for materials) in the first year of implementation with zero recurring costs.

One commenter raised concerns with the notice requirement being overly broad because it would require a multi-State health care entity to post notices at every location where workforce notices are customarily posted to permit ready observation, even if the particular location had no connection to the funding or activity giving rise to the obligation to post the notice. The final rule's modification of the notice from mandatory to voluntary should resolve this concern. Additionally, the rule provides for posting in locations as ''applicable and appropriate.''

One commenter expressed concern that the Department's estimate of time that an administrative assistant would spend to post the notice did not take into account the multiple facilities owned by a corporate entity. The estimates for the Paperwork Reduction Act and in the RIA, however, do take this into account because the Department multiplied the per facility labor and materials costs by the number of facilities (*i.e.,* establishments) over which a corporate entity (*i.e.,* firm) exercises common ownership and control.

(viii) Burden for Voluntary Web Posting

To post the notice on the web, the Department estimates that it will take 2 hours for a web developer at each recipient's physical location to execute the design and technical elements for posting. This labor cost is approximately $12.5 million (2 hours × $34.69 per hour × 180,337 establishments) in the first year of implementation with zero recurring costs.[391]

(ix) Burden for Voluntary Posting in Two Publications

The Department assumes that, within the first year after the rule's publication, each recipient voluntarily posting notices in publications would identify two publications in which to include the notice, revising the document or its layout to include the notice, or otherwise printing an insert to include with hard copies of the publication.[392] Acknowledging the uncertainties outlined *supra* at part IV.C.3.iii, the Department estimates the annual costs of labor, material, and postage according to the following assumptions. The Department assumes that (1) establishments that include notices of rights in publications will most often do so in online publications or in hard-copy publications hand-distributed, where the notice's inclusion results in an additional 100 hard copy notices per establishment per year, and (2) half of the establishments associated with covered recipients voluntarily providing hard copy notices (*i.e.,* 90,166 establishments in year one and 67,624 establishments annually in years two through five)[393] will mail the publications for which the weight of the notice incrementally increases the postage costs. These assumptions may differ from the actual experience of recipients' implementation, as described *supra* at part IV.C.3.iii.

Using the model, hourly estimates, and other assumptions described *supra* at part IV.C.3.iii, the average labor cost, excluding mailing-related labor costs, resulting from including notices in relevant publications is $7.0 million in year one ($19.39 per hour × 2 hours × 180,331 establishments) and $2.6 million annually in years two through five ($19.39 per hour × 1 hour × 135,249 establishments).[394] Based on the marginal cost of postage per ounce of $0.15,[395] an annual number of mailings of 100 pages per establishment, average annual labor cost for mailing of $19.39 per hour, and an average number of labor hours per mailing of 0.25 hours, the total costs due to the voluntary mailing of notices is $1.8 million[396] in year one and $1.3 million[397] annually in years two through five.[398] Finally, the

[390] This total differs from the burden in the RIA because a fully loaded wage that is adjusted upwards for benefits and overhead must be used.

[391] This total differs from the estimate of the burden in the RIA because the RIA uses a fully loaded wage rate (*i.e.,* including benefits and overhead) not employed here.

[392] Under the final rule, because all the notice provisions are voluntary, the Department assumes that 75% of entities that voluntarily provide notices in year one will continue to do so in out years and there will be lower attrition compared to the estimate provided in the proposed rule.

[393] Product of 180,331 establishments times 50 percent for year one. Product of 135,249 establishments times 50 percent for years two through five.

[394] These totals differ from the estimate of the burden in the RIA because the RIA uses a fully loaded wage rate (*i.e.,* including benefits and overhead) not employed here.

[395] *See* U.S. Postal Service Postage Rates, *https://www.stamps.com/usps/current-postage-rates/.*

[396] Sum of incremental postage of $1.4 million ($0.15 per mailing × 100 mailings × 90,166 establishments) and incremental labor of $437,078 ($19.39 per hour × 0.25 hours × 90,166 establishments).

[397] Sum of incremental postage of $1.0 million ($0.15 per mailing × 100 mailings × 67,624 establishments) and incremental labor of $327,809 ($19.39 per hour × 0.25 hours × 67,624 establishments).

[398] This total differs from the estimate of the burden in the RIA because the RIA uses a fully

Continued

annual cost of printed materials for notices (both mailed and hand distributed) is $0.9 million (180,331 establishments × 100 pages × $.05 per page) in year one and $676,243 annually in years two through five (135,249 establishments × 100 pages × $.05 per page).

In sum, the total expected cost of activities related to the voluntary posting and distributions of notices that § 88.5 incentivizes is $28.7 million in the first year and $4.6 million annually in years two through five.

(x) Burden to the Federal Government

Unlike the burden estimated in the RIA of the rule, the PRA burden to the Department associated with § 88.5 excludes the costs of posting the notice for those HHS components that post it verbatim because the Department is supplying the language of the notice for the purpose of disclosure to the public, under 5 CFR 1320.3(c)(2). Because the Department components will likely post the notice from Appendix A verbatim, all costs to the Department under the PRA for § 88.5 are excluded.

The remaining issue raised by commenters is whether the rule requires translation of the notice into non-English languages. Under the conscience protection and associated anti-discrimination laws and this rule, translation or posting of translated notices is not independently required. However, recipients subject to this rule may also have independent obligations to provide language assistance services and meaningful access to individuals with limited English proficiency when abiding by the prohibition of national origin discrimination in Federal civil rights laws that OCR enforces.[399]

The Department asked for public comment on the following issues and received no comments:

- Whether the proposed collection of information is necessary for the proper performance of the Department's functions to enforce Federal laws on which Federal funding is conditioned, including whether the information will have practical utility;
- Whether the public had feedback on the assumptions that formed the basis of the cost estimates for the notice provision; and
- How the manner of compliance with the notice provision could be improved, including through the use of automated collection techniques or other forms of information technology.

3. Compliance Procedures (§ 88.6(d))

(i) Summary of the Collection of Information

Paragraph 88.6(d) requires any recipient or sub-recipient that is subject to a determination by OCR of noncompliance with this part concerning Federal conscience and anti-discrimination laws to report this fact in any application for new or renewed Federal financial assistance or Departmental funding in the three years following the determination of noncompliance. This includes a requirement that recipients disclose any OCR determinations made against their sub-recipients.

(ii) Need for Information

The information alerts applicable Departmental components of OCR's determination of noncompliance on the part of the recipient or sub-recipient, to ensure appropriate coordination within the Department during OCR's enforcement of Federal conscience and anti-discrimination laws, and to inform funding decision-making.

(iii) Use of Information

This requirement puts the Departmental component on notice of OCR's determination of noncompliance to inform a component's decision whether to approve, renew, or modify Federal funding to the recipient. This requirement also facilitates coordination between the component and OCR on the status of the recipient or sub-recipient's compliance status.

(iv) Description of the Respondents

The respondents are recipients and sub-recipients that HHS OCR has found noncompliant with this final rule.

(v) Number of Respondents

As explained, *supra* at part IV.C.3.v, the Department cannot predict the number of entities that OCR will find noncompliant with the rule.

(vi) Burden of Response

The Department estimates it would take a records custodian at the experience level of a paralegal about 15 minutes to retrieve the relevant information (such as date of the violation finding and the OCR ''transaction number'' (*e.g.,* case number)) from the recipient's or sub-recipient's records and an administrative assistant 15 minutes to enter the information on the application. Based on the methods and assumptions *supra* at part IV.C.3.v, the Department assumes that a recipient, at the highest end, would submit 2,000 applications each year for new funding opportunities, supplemental funding, and non-competing continuations, among others. The mean weighted hourly wage for the paralegal and administrative assistant is $22.66, which excludes benefits and overhead. Each recipient or sub-recipient found in violation of the rule would expend on the highest end, $22,655 per year in labor costs at the firm level ($22.66 per hour × 2,000 applications × 0.5 hours).[400]

Commenters stated that the version of this requirement in the proposed rule was redundant and duplicative. The Department agrees. The final rule and this information collection has been modified substantially to require recipients and sub-recipients to notify the Departmental components from which the recipient or sub-recipient receives Federal funds in the three years following a determination of noncompliance with Federal conscience and anti-discrimination laws and this final rule by OCR.

List of Subjects in 45 CFR Part 88

Abortion, Adult education, Advanced directives, Assisted suicide, Authority delegations, Childbirth, Civil rights, Coercion, Colleges and universities, Community facilities, Contracts, Educational facilities, Employment, Euthanasia, Family planning, Federal-State relations, Government contracts, Government employees, Grant programs-health, Grants administration, Health care, Health facilities, Health insurance, Health professions, Hospitals, Immunization, Indian Tribes, Insurance, Insurance companies, Laboratories, Manpower training programs, Maternal and child health, Medicaid, Medical and dental schools, Medical research, Medicare, Mental health programs, Mercy killing, Moral convictions, Nondiscrimination, Nursing homes, Nursing schools, Occupational safety and health, Occupational training, Physicians, Prescription drugs, Public assistance programs, Public awareness, Public health, Religious discrimination, Religious beliefs, Religious liberties, Religious nonmedical health care institutions, Reporting and recordkeeping requirements, Rights of conscience, Scholarships and fellowships, Schools, Scientists, State and local governments, Sterilization,

loaded wage rate (*i.e.,* including benefits and overhead) not employed here.

[399] *E.g.,* 42 U.S.C. 2000d (Title VI of the Civil Rights Act of 1964); 45 CFR part 80 (HHS implementing regulations); Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 FR 47311, 47313 (Aug. 8, 2003).

[400] This total differs from the burden in the RIA because a fully loaded wage that is adjusted upwards for benefits and overhead must be used.

Students, Technical assistance, Tribal Organizations.

■ For the reasons set forth in the preamble, the Department of Health and Human Services revises 45 CFR part 88 to read as follows:

PART 88—PROTECTING STATUTORY CONSCIENCE RIGHTS IN HEALTH CARE; DELEGATIONS OF AUTHORITY

Authority: 42 U.S.C. 300a–7 (the Church Amendments); 42 U.S.C. 238n (Coats-Snowe Amendment); the Weldon Amendment (*e.g.,* Pub. L. 115–245, Div. B, sec. 507(d)); 42 U.S.C. 18113 (Section 1553 of the Affordable Care Act); Medicare Advantage (*e.g.,* Pub. L. 115–245, Div. B, sec. 209); the Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f) (*e.g.,* Pub. L. 116–6, Div. F, sec. 7018); 22 U.S.C. 7631(d); 29 U.S.C. 669(a)(5); 42 U.S.C. 300gg–92; 42 U.S.C. 1302(a); 42 U.S.C. 18041(a) (Section 1321 of the Affordable Care Act); 42 U.S.C. 18081 (Section 1411 of the Affordable Care Act); 42 U.S.C. 18023 (Section 1303 of the Affordable Care Act); 26 U.S.C. 5000A(d)(2); 42 U.S.C. 18031; 42 U.S.C. 280g–1(d); 42 U.S.C. 290bb–36(f); 42 U.S.C. 1315; 42 U.S.C. 1315a; 42 U.S.C. 1320a–1; 42 U.S.C. 1320c–11; 42 U.S.C. 1395cc(f); 42 U.S.C. 1395i–3; 42 U.S.C. 1395i–5; 42 U.S.C. 1395w–22(j)(3)(B); 42 U.S.C. 1395w–26; 42 U.S.C. 1395w–27; 42 U.S.C. 1395x; 42 U.S.C. 1396a; 42 U.S.C. 1396a(w)(3); 42 U.S.C. 1396f; 42 U.S.C. 1396r; 42 U.S.C. 1396s(c)(2)(B)(ii); 42 U.S.C. 1396u–2(b)(3)(B); 42 U.S.C. 1397j–1(b); 42 U.S.C. 5106i(a); 42 U.S.C. 14406; 5 U.S.C. 301; 40 U.S.C. 121(c); 42 U.S.C. 263a(f)(1)(E); 45 CFR parts 75 and 96; 48 CFR chapter 1; 48 CFR parts 300 thru 370; 2 CFR part 376.

§ 88.1 Purpose.

The purpose of this part is to provide for the implementation and enforcement of the Federal conscience and anti-discrimination laws listed in § 88.3. Such laws, for example, protect the rights of individuals, entities, and health care entities to refuse to perform, assist in the performance of, or undergo certain health care services or research activities to which they may object for religious, moral, ethical, or other reasons. Such laws also protect patients from being subjected to certain health care or services over their conscientious objection. Consistent with their objective to protect the conscience and associated anti-discrimination rights of individuals, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes.

§ 88.2 Definitions.

For the purposes of this part:

Assist in the performance means to take an action that has a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity. This may include counseling, referral, training, or otherwise making arrangements for the procedure or a part of a health service program or research activity, depending on whether aid is provided by such actions.

Department means the Department of Health and Human Services and any component thereof.

Discriminate or *discrimination* includes, as applicable to, and to the extent permitted by, the applicable statute:

(1) To withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, title, or other similar instrument, position, or status;

(2) To withhold, reduce, exclude from, terminate, restrict, or make unavailable or deny any benefit or privilege or impose any penalty; or

(3) To utilize any criterion, method of administration, or site selection, including the enactment, application, or enforcement of laws, regulations, policies, or procedures directly or through contractual or other arrangements, that subjects individuals or entities protected under this part to any adverse treatment with respect to individuals, entities, or conduct protected under this part on grounds prohibited under an applicable statute encompassed by this part.

(4) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part shall not be regarded as having engaged in discrimination against a protected entity where the entity offers and the protected entity voluntarily accepts an effective accommodation for the exercise of such protected entity's protected conduct, religious beliefs, or moral convictions. In determining whether any entity has engaged in discriminatory action with respect to any complaint or compliance review under this part, OCR will take into account the degree to which an entity had implemented policies to provide effective accommodations for the exercise of protected conduct, religious beliefs, or moral convictions under this part and whether or not the entity took any adverse action against a protected entity on the basis of protected conduct, beliefs, or convictions before the provision of any accommodation.

(5) Notwithstanding paragraphs (1) through (3) of this definition, an entity subject to any prohibition in this part may require a protected entity to inform it of objections to performing, referring for, participating in, or assisting in the performance of specific procedures, programs, research, counseling, or treatments, but only to the extent that there is a reasonable likelihood that the protected entity may be asked in good faith to perform, refer for, participate in, or assist in the performance of, any act or conduct just described. Such inquiry may only occur after the hiring of, contracting with, or awarding of a grant or benefit to a protected entity, and once per calendar year thereafter, unless supported by a persuasive justification.

(6) The taking of steps by an entity subject to prohibitions in this part to use alternate staff or methods to provide or further any objected-to conduct identified in paragraph (5) of this definition would not, by itself, constitute discrimination or a prohibited referral, if such entity does not require any additional action by, or does not take any adverse action against, the objecting protected entity (including individuals or health care entities), and if such methods do not exclude protected entities from fields of practice on the basis of their protected objections. Entities subject to prohibitions in this part may also inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct, but such entity may not do so in a manner that constitutes adverse or retaliatory action against an objecting entity.

Entity means a ''person'' as defined in 1 U.S.C. 1; the Department; a State, political subdivision of any State, instrumentality of any State or political subdivision thereof; any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State; or, as applicable, a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Federal financial assistance includes:

(1) Grants and loans of Federal funds;

(2) The grant or loan of Federal property and interests in property;

(3) The detail of Federal personnel;

(4) The sale or lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale or lease to the recipient; and

(5) Any agreement or other contract between the Federal government and a recipient that has as one of its purposes the provision of a subsidy to the recipient.

Health care entity includes:

(1) For purposes of the Coats-Snowe Amendment (42 U.S.C. 238n) and the subsections of this part implementing that law (§ 88.3(b)), an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; or any other health care provider or health care facility. As applicable, components of State or local governments may be health care entities under the Coats-Snowe Amendment; and

(2) For purposes of the Weldon Amendment (*e.g.,* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Pub. L. 115–245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018)), Patient Protection and Affordable Care Act section 1553 (42 U.S.C. 18113), and to sections of this part implementing those laws (§ 88.3(c) and (e)), an individual physician or other health care professional, including a pharmacist; health care personnel; a participant in a program of training in the health professions; an applicant for training or study in the health professions; a post-graduate physician training program; a hospital; a medical laboratory; an entity engaging in biomedical or behavioral research; a pharmacy; a provider-sponsored organization; a health maintenance organization; a health insurance issuer; a health insurance plan (including group or individual plans); a plan sponsor or third-party administrator; or any other kind of health care organization, facility, or plan. As applicable, components of State or local governments may be health care entities under the Weldon Amendment and Patient Protection and Affordable Care Act section 1553.

Health service program includes the provision or administration of any health or health-related services or research activities, health benefits, health or health-related insurance coverage, health studies, or any other service related to health or wellness, whether directly; through payments, grants, contracts, or other instruments; through insurance; or otherwise.

Instrument is the means by which Federal funds are conveyed to a recipient and includes grants, cooperative agreements, contracts, grants under a contract, memoranda of understanding, loans, loan guarantees, stipends, and any other funding or employment instrument or contract.

OCR means the Office for Civil Rights of the Department of Health and Human Services.

Recipient means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, and any person or any public or private agency, institution, organization, or other entity in any State, including any successor, assign, or transferee thereof, to whom Federal financial assistance is extended directly from the Department or a component of the Department, or who otherwise receives Federal funds directly from the Department or a component of the Department, but such term does not include any ultimate beneficiary. The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Referral or *refer for* includes the provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web addresses, directions, instructions, descriptions, or other information resources), where the purpose or reasonably foreseeable outcome of provision of the information is to assist a person in receiving funding or financing for, training in, obtaining, or performing a particular health care service, program, activity, or procedure.

State includes, in addition to the several States, the District of Columbia. For those provisions related to or relying upon the Public Health Service Act, the term ''State'' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands. For those provisions related to or relying upon the Social Security Act, such as Medicaid or the Children's Health Insurance Program, the term ''State'' shall be defined in accordance with the definition of ''State'' found at 42 U.S.C. 1301.

Sub-recipient means any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, or any person or any public or private agency, institution, organization, or other entity in any State, including any successor, assign, or transferee thereof, to whom there is a pass-through of Federal financial assistance or Federal funds from the Department through a recipient or another sub-recipient, but such term does not include any ultimate beneficiary. The term may include a foreign government, foreign nongovernmental organization, or intergovernmental organization (such as the United Nations or its affiliated agencies).

Workforce means employees, volunteers, trainees, contractors, and other persons whose conduct, in the performance of work for an entity or health care entity, is under the direct control of such entity or health care entity, whether or not they are paid by the entity or health care entity, as well as health care providers holding privileges with the entity or health care entity.

§ 88.3 Applicable requirements and prohibitions.

(a) *The Church Amendments, 42 U.S.C. 300a–7*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (a)(2)(i) through (vii) of this section and § 88.6 of this part.

(ii) Any State or local government or subdivision thereof and any other public entity is required to comply with paragraphs (a)(2)(i) through (iii) of this section.

(iii) Any entity that receives a grant, contract, loan, or loan guarantee under the Public Health Service Act (42 U.S.C. 201 *et seq.*) after June 18, 1973, is required to comply with paragraph (a)(2)(iv) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any entity that receives a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services after July 12, 1974, is required to comply with paragraph (a)(2)(v) of this section and §§ 88.4 and 88.6 of this part.

(v) The Department and any entity that receives funds for any health

service program or research activity under any program administered by the Secretary of Health and Human Services is required to comply with paragraph (a)(2)(vi) of this section and §§ 88.4 and 88.6 of this part.

(vi) Any entity that receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C. 15001 *et seq.*] is required to comply with paragraph (a)(2)(vii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 300a–7(b)(1), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any individual does not authorize entities to which this paragraph (a)(2)(i) applies to require such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.

(ii) Pursuant to 42 U.S.C. 300a–7(b)(2)(A), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any recipient does not authorize entities to which this paragraph (a)(2)(ii) applies to require such recipient to make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the recipient on the basis of religious beliefs or moral convictions.

(iii) Pursuant to 42 U.S.C. 300a–7(b)(2)(B), the receipt of a grant, contract, loan, or loan guarantee under the Public Health Service Act by any recipient does not authorize entities to which this paragraph (a)(2)(iii) applies to require such recipient to provide personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(iv) Pursuant to 42 U.S.C. 300a–7(c)(1), entities to which this paragraph (a)(2)(iv) applies shall not discriminate against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges because such physician or other health care personnel performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of a lawful sterilization procedure or abortion on the grounds that his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(v) Pursuant to 42 U.S.C. 300a–7(c)(2), entities to which this paragraph (a)(2)(v) applies shall not discriminate against any physician or other health care personnel in employment, promotion, termination of employment, or extension of staff or other privileges because such physician or other health care personnel performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(vi) Pursuant to 42 U.S.C. 300a–7(d), entities to which this paragraph (a)(2)(vi) applies shall not require any individual to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if the individual's performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(vii) Pursuant to 42 U.S.C. 300a–7(e), entities to which this paragraph (a)(2)(vii) applies shall not deny admission to or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance or willingness to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to, or consistent with, the applicant's religious beliefs or moral convictions.

(b) *The Coats-Snowe Amendment (Section 245 of the Public Health Service Act), 42 U.S.C. 238n*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (b)(2)(i) through (ii) of this section and § 88.6 of this part.

(ii) Any State or local government or subdivision thereof that receives Federal financial assistance, including Federal payments provided as reimbursement for carrying out health-related activities, is required to comply with paragraphs (b)(2)(i) through (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 238n(a)(1), (2), and (3), entities to which this paragraph (b)(2)(i) applies shall not subject any health care entity to discrimination on the basis that the health care entity—

(A) Refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(B) Refuses to make arrangements for any of the activities specified in (b)(2)(i)(A); or

(C) Attends or attended a post-graduate physician training program or any other program of training in the health professions that does not or did not perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(ii) Pursuant to 42 U.S.C. 238n(b), entities to which this paragraph (b)(2)(ii) applies shall not, for the purposes of granting a legal status to a health care entity (including a license or certificate), or providing such entity with financial assistance, services, or benefits, fail to deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon accreditation standards that require an entity to perform an induced abortion or that require an entity to require, provide, or refer for training in the performance of induced abortions or make arrangements for such training, regardless of whether such standards provide exceptions or exemptions. Entities to which this paragraph (b)(2)(ii) applies and which are involved in such matters shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this paragraph.

(c) *Weldon Amendment (See, e.g., Pub. L. 115–245, Div. B, sec. 507(d))*—(1) *Applicability.* (i) The Department and its programs, while operating under an appropriations act that contains the Weldon Amendment, are required to comply with paragraph (c)(2) of this section and § 88.6 of this part.

(ii) Any State or local government that receives funds under an appropriations act for the Department that contains the Weldon Amendment is required to

comply with paragraph (c)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (c)(2) applies shall not subject any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.

(d) *Medicare Advantage (See, e.g., Pub. L. 115–245, Div. B, sec. 209)*—(1) *Applicability.* The Department, while operating under an appropriations act that contains a provision with respect to the Medicare Advantage program as set forth by Public Law 115–245, Div. B, sec. 209, is required to comply with paragraph (d)(2) of this section and § 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (d)(2) applies shall not deny participation in the Medicare Advantage program to an otherwise eligible entity (including a Provider Sponsored Organization) because that entity informs the Secretary that it will not provide, pay for, provide coverage of, or provide referrals for abortions.

(e) *Section 1553 of the Affordable Care Act, 42 U.S.C. 18113*—(1) *Applicability.* (i) The Department is required to comply with paragraph (e)(2) of this section and § 88.6 of this part.

(ii) Any State or local government that receives Federal financial assistance under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any health care provider that receives Federal financial assistance under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any health plan created under the Patient Protection and Affordable Care Act (or under an amendment made by the Patient Protection and Affordable Care Act) is required to comply with paragraph (e)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibition.* The entities to which this paragraph (e)(2) applies shall not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing. Nothing in this paragraph shall be construed to apply to, or to affect, any limitation relating to:

(i) The withholding or withdrawing of medical treatment or medical care;

(ii) The withholding or withdrawing of nutrition or hydration;

(iii) Abortion; or

(iv) The use of an item, good, benefit, or service furnished for the purpose of alleviating pain or discomfort, even if such use may increase the risk of death, so long as such item, good, benefit, or service is not also furnished for the purpose of causing, or the purpose of assisting in causing, death, for any reason.

(f) *Section 1303 of the Affordable Care Act, 42 U.S.C. 18023*—(1) *Applicability.* (i) The Department is required to comply with paragraph (f)(2)(i) of this section and § 88.6 of this part.

(ii) Qualified health plans, as defined under 42 U.S.C. 18021, offered through any Exchange created under the Patient Protection and Affordable Care Act, are required to comply with paragraphs (f)(2)(i) and (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 18023(b)(1)(A)(i), entities to which this paragraph (f)(2)(i) applies shall not construe anything in Title I of the Patient Protection and Affordable Care Act (or any amendment made by Title I of the Patient Protection and Affordable Care Act) to require a qualified health plan to provide coverage of abortion or abortion-related services as described in 42 U.S.C. 18023(b)(1)(B)(i) or (ii) as part of its essential health benefits for any plan year.

(ii) Pursuant to 42 U.S.C. 18023(b)(4), entities to which this paragraph (f)(2)(ii) applies shall not discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.

(g) *Section 1411 of the Affordable Care Act, 42 U.S.C. 18081*—(1) *Applicability.* The Department shall comply with paragraph (g)(2) of this section and § 88.6 of this part.

(2) *Requirement.* The Department shall provide a certification documenting a religious exemption from the individual responsibility requirement and penalty under the Patient Protection and Affordable Care Act and shall coordinate with State Health Benefit Exchanges in the implementing of the certification requirements of 42 U.S.C. 18031(d)(4)(H)(ii) where applicable to:

(i) Any applicant for such a certificate for any month who provides information demonstrating that the applicant:

(A) Is an adherent of religious tenets or teachings by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act), or

(B) Is an adherent of religious tenets or teachings that are not described in paragraph (g)(2)(i)(A) of this section, who relies solely on a religious method of healing, and for whom the acceptance of medical health services would be inconsistent with the religious beliefs of the individual, and the application for the certificate includes an attestation that the individual has not received medical health services during the preceding taxable year.

(*1*) For purposes of this paragraph (g)(2)(i)(B), ''medical health services'' does not include routine dental, vision and hearing services, midwifery services, vaccinations, necessary medical services provided to children, services required by law or by a third party, and such other services as the Secretary may provide in implementing section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act;

and

(ii) Any applicant for such a certificate for any month who provides information demonstrating that the applicant is a member of a ''health care sharing ministry,'' as defined in 26 U.S.C. 5000A(d)(2)(B)(ii), for the month.

(h) *Counseling and referral provisions of 42 U.S.C. 1395w–22(j)(3)(B) and 1396u–2(b)(3)(B)*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (h)(2)(i) and (ii) of this section and § 88.6 of this part.

(ii) Any State agency that administers a Medicaid program is required to comply with paragraph (h)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Pursuant to 42 U.S.C. 1395w–22(j)(3)(B), entities to which this paragraph (h)(2)(i) applies shall not construe 42 U.S.C. 1395w–22(j)(3)(A) or 42 CFR 422.206(a) to require a Medicare Advantage organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization offering the plan:

(A) Objects to the provision of such service on moral or religious grounds, and

(B) In the manner and through the written instrumentalities such organization deems appropriate, makes

available information on its policies regarding such service to prospective enrollees before or during enrollment and to enrollees within 90 days after the date that the organization adopts a change in policy regarding such a counseling or referral service.

(ii) Pursuant to 42 U.S.C. 1396u–2(b)(3)(B), entities to which this paragraph (h)(2)(ii) applies shall not construe 42 U.S.C. 1396u–2(b)(3)(A) or 42 CFR 438.102(a)(1) to require a Medicaid managed care organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization:

(A) Objects to the provision of such service on moral or religious grounds, and

(B) In the manner and through the written instrumentalities such organization deems appropriate, makes available information on its policies regarding such service to prospective enrollees before or during enrollment and to enrollees within 90 days after the date that the organization adopts a change in policy regarding such a counseling or referral service.

(i) *Advance Directives, 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406*—(1) *Applicability.* (i) The Department is required to comply with paragraph (i)(2) of this section and § 88.6 of this part with respect to the Medicare and Medicaid programs.

(ii) Any State agency that administers a Medicaid program is required to comply with paragraph (i)(2) of this section and §§ 88.4 and 88.6 of this part with respect to its Medicaid program.

(2) *Prohibitions.* The entities to which this paragraph (i)(2) applies shall not:

(i) Construe 42 U.S.C. 1395cc(f) or 1396a(w)(3) to require any provider or organization, or any employee of such a provider or organization, to inform or counsel any individual regarding any right to obtain an item or service furnished for the purpose of causing, or the purpose of assisting in causing, the death of the individual, such as by assisted suicide, euthanasia, or mercy killing; or to apply to or affect any requirement with respect to a portion of an advance directive that directs the purposeful causing of, or the purposeful assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing; or

(ii) Construe 42 U.S.C. 1396a to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which as a matter of conscience cannot implement an advance directive.

(j) *Global Health Programs, 22 U.S.C. 7631(d)*—(1) *Applicability.* (i) The Department is required to comply with paragraph (j)(2) of this section and § 88.6 of this part.

(ii) Any entity that is authorized by statute, regulation, or agreement to obligate Federal financial assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2), under Chapter 83 of Title 22 of the U.S. Code or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such Federal financial assistance is administered by the Secretary, is required to comply with paragraph (j)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibitions.* The entities to which this paragraph (j)(2) applies shall not:

(i) Require an organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2), under Chapter 83 of Title 22 of the U.S. Code, or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such assistance is administered by the Secretary, for HIV/AIDS prevention, treatment, or care to, as a condition of such assistance:

(A) Endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) Endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection.

(ii) Discriminate against an organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b–2), under Chapter 83 of Title 22 of the U.S. Code, or under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, to the extent such assistance is administered by the Secretary, for HIV/AIDS prevention, treatment, or care, in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (j)(2)(i) of this section.

(k) *The Helms, Biden, 1978, and 1985 Amendments, 22 U.S.C. 2151b(f); see, e.g., Consolidated Appropriations Act, 2019, Public Law 116–6, Div. F, sec. 7018*—(1) *Applicability.* (i) The Department is required to comply with paragraph (k)(2)(i) of this section and § 88.6 of this part.

(ii) Any entity that is authorized by statute, regulation, or agreement to obligate or expend Federal financial assistance under part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151b–2), to the extent administered by the Secretary, is required to comply with paragraph (k)(2)(i) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any entity that receives Federal financial assistance under part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151b–2), to the extent administered by the Secretary, is required to comply with paragraph (k)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Prohibitions.* (i) The entities to which this paragraph (k)(2)(i) applies shall not:

(A) Permit Federal financial assistance identified in paragraph (k)(1)(ii) of this section to be used in a manner that would violate provisions in paragraphs (k)(2)(ii)(A)(*1*) through (*5*) of this section related to abortions and involuntary sterilizations.

(B) Obligate or expend Federal financial assistance under an appropriations act that contains the 1985 Amendment and identified in paragraph (k)(1)(ii) of this section for any country or organization if the President certifies that the use of these funds by any such country or organization would violate provisions in paragraphs (k)(2)(ii)(A)(*1*) through (*5*) of this section related to abortions and involuntary sterilizations.

(ii) The entities to which this paragraph (k)(2)(ii) applies shall not:

(A) Use such Federal financial assistance identified in paragraph (k)(1)(iii) of this section to:

(*1*) Pay for the performance of abortions as a method of family planning;

(*2*) Motivate or coerce any person to practice abortions;

(*3*) Pay for the performance of involuntary sterilizations as a method of family planning;

(*4*) Coerce or provide any financial incentive to any person to undergo sterilizations; or

(*5*) Pay for any biomedical research that relates in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

(B) Obligate or expend Federal financial assistance under an appropriations act that contains the 1985 Amendment and identified in paragraph (k)(1)(iii) of this section for

any country or organization if the President certifies that the use of these funds by any such country or organization would violate provisions in paragraphs (k)(2)(ii)(A)(*1*) through (*5*) of this section related to abortions and involuntary sterilizations.

(l) *Newborn and Infant Hearing Loss Screening, 42 U.S.C. 280g–1(d)*—(1) *Applicability.* The Department is required to comply with paragraph (l)(2) of this section and § 88.6 of this part.

(2) *Requirement.* The Department shall not construe 42 U.S.C. 280g–1 to preempt or prohibit any State law that does not require the screening for hearing loss of children of parents who object to the screening on the grounds that it conflicts with the parents' religious beliefs.

(m) *Medical Screening, Examination, Diagnosis, Treatment, or Other Health Care or Services, 42 U.S.C. 1396f*—(1) *Applicability.* The Department is required to comply with paragraph (m)(2) of this section and § 88.6 of this part.

(2) *Requirements and prohibitions.* The Department shall not construe anything in 42 U.S.C. 1396 *et seq.* to require a State agency that administers a State Medicaid Plan to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parent or guardian objects) thereto on religious grounds.

(n) *Occupational Illness Examinations and Tests, 29 U.S.C. 669(a)(5)*—(1) *Applicability.* (i) The Department is required to comply with paragraph (n)(2) of this section and § 88.6 of this part.

(ii) Any recipient of grants or contracts under 29 U.S.C. 669, to the extent administered by the Secretary, is required to comply with paragraph (n)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements.* Entities to which this paragraph (n)(2) applies shall not deem any provision of 29 U.S.C. 651 *et seq.* to authorize or require medical examination, immunization, or treatment, as provided under 29 U.S.C. 669, for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.

(o) *Vaccination, 42 U.S.C. 1396s(c)(2)(B)(ii)*—(1) *Applicability.* (i) The Department is required to comply with paragraph (o)(2) of this section and § 88.6 of this part.

(ii) Any State agency that administers a pediatric vaccine distribution program under 42 U.S.C. 1396s is required to comply with paragraph (o)(2) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirement.* The entities to which this paragraph (o)(2) applies shall ensure that, under any State-administered pediatric vaccine distribution program under 42 U.S.C. 1396s, the provider agreement executed by any program-registered provider, as defined under 42 U.S.C. 1396s(c)(1), includes the requirement that the program-registered provider will provide pediatric vaccines in compliance with all applicable State law relating to any religious or other exemption. Such State law may include State statutory, regulatory, or constitutional protections for conscience and religious freedom, where applicable.

(p) *Specific Assessment, Prevention and Treatment Services, 42 U.S.C. 290bb–36(f), 5106i(a)*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (p)(2)(i) through (iii) of this section and § 88.6 of this part.

(ii) Any State, political subdivision, public organization, private nonprofit organization, institution of higher education, or tribal organization actively involved with the State-sponsored statewide or tribal youth suicide early intervention and prevention strategy, designated by a State to develop or direct the State-sponsored Statewide youth suicide early intervention and prevention strategy under 42 U.S.C. 290bb–36 and that receives a grant or cooperative agreement thereunder, is required to comply with paragraph (p)(2)(iii) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any federally recognized Indian tribe or tribal organization (as defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*)) or an urban Indian organization (as defined in the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*)) that is actively involved in the development and continuation of a tribal youth suicide early intervention and prevention strategy under 42 U.S.C. 290bb–36 and that receives a grant or cooperative agreement thereunder is required to comply with paragraph (p)(2)(iii) of this section.

(iv) Any entity that receives funds under 42 U.S.C. chapter 67, subchapters I or III is required to comply with paragraphs (p)(2)(i) and (ii) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) Entities to which this paragraph (p)(2)(i) applies shall not construe the receipt of funds under or anything in 42 U.S.C. chapter 67, subchapters I or III as establishing any Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian.

(ii) Entities to which this paragraph (p)(2)(ii) applies shall not construe the receipt of funds under or anything in 42 U.S.C. chapter 67, subchapters I or III as requiring a State to find, or prohibiting a State from finding, child abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.

(iii) Entities to which this paragraph (p)(2)(iii) applies shall not construe anything in 42 U.S.C. 290bb–36 to require suicide assessment, early intervention, or treatment services for youth whose parents or legal guardians object based on the parents' or legal guardians' religious beliefs or moral objections.

(q) *Religious nonmedical health care, 42 U.S.C. 1320a–1(h), 1320c–11, 1395i–5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j–1(b)*—(1) *Applicability.* (i) The Department is required to comply with paragraphs (q)(2)(i) through (iv) of this section and § 88.6 of this part.

(ii) Any State agency that makes an agreement with the Secretary pursuant to 42 U.S.C. 1320a–1(b) is required to comply with paragraph (q)(2)(i) of this section and §§ 88.4 and 88.6 of this part.

(iii) Any entity receiving Federal financial assistance from participating in Medicare is required to comply with paragraphs (q)(2)(ii) of this section and §§ 88.4 and 88.6 of this part.

(iv) Any entity, including a State, receiving Federal financial assistance from participating in Medicaid, including any entity receiving Federal financial assistance through CHIP that is used to expand Medicaid, is required to comply with paragraphs (q)(2)(iii) of this section and §§ 88.4 and 88.6 of this part.

(v) Any entity, including a State or local government or subdivision thereof, receiving Federal financial assistance under subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j–1397m–5) is required to comply with paragraph (q)(2)(iv) of this section and §§ 88.4 and 88.6 of this part.

(2) *Requirements and prohibitions.* (i) The entities to which this paragraph (q)(2)(i) applies shall not apply the provisions of 42 U.S.C. 1320a–1 to a

religious nonmedical health care institution as defined in 42 U.S.C. 1395x(ss)(1).

(ii) With respect to a religious nonmedical health care institution as defined in 42 U.S.C. 1395x(ss)(1), the entities to which this paragraph (q)(2)(ii) applies shall not:

(A) Fail or refuse to make a payment under part A of subchapter XVIII of chapter 7 of Title 42 of the U.S. Code for inpatient hospital services, post-hospital extended care services, or home health services furnished to an individual by a religious nonmedical health care institution that is a hospital as defined in 42 U.S.C. 1395x(e), a skilled nursing facility as defined in 42 U.S.C. 1395x(y), or a home health agency as defined in 42 U.S.C. 1395x(aaa), respectively, if the condition under 42 U.S.C. 1395i–5(a)(2) is satisfied and an individual makes an election pursuant to 1395i–5(b) that:

(*1*) Such individual is conscientiously opposed to acceptance of medical care or treatment other than medical care or treatment (including medical and other health services) that is:

(*i*) Received involuntarily, or

(*ii*) Required under Federal or State law or law of a political subdivision of a State; and

(*2*) Acceptance of such medical treatment would be inconsistent with such individual's sincere religious beliefs, or

(B) In administering 42 U.S.C. 1395i–5 or 1395x(ss)(1):

(*1*) Require any patient of a religious nonmedical health care institution to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient (or legal representative of the patient) objects to such service on religious grounds, or

(*2*) Subject a religious nonmedical health care institution or its personnel to any medical supervision, regulation, or control, insofar as such supervision, regulation, or control would be contrary to the religious beliefs observed by the institution or such personnel, or

(C) Subject religious nonmedical health care institution to the provisions of part B of subchapter XI of Chapter 7 of Title 42 of the U.S. Code.

(iii) Pursuant to 42 U.S.C. 1396a(a), the entities to which this paragraph (q)(2)(iii) applies shall not fail or refuse to exempt a religious nonmedical health care institution from the Medicaid requirements to:

(A) Meet State standards described in 42 U.S.C. 1396a(a)(9)(A);

(B) Be evaluated under 42 U.S.C. 1396a(a)(33), on the appropriateness and quality of care and services;

(C) Undergo a regular program, under 42 U.S.C. 1396(a)(31), of independent professional review, including medical evaluation, of services in an intermediate care facility for persons with mental disabilities; and

(D) Meet the requirements of 42 U.S.C. 1396(b)(i)(4) to establish a utilization review plan consistent with, or superior to, the utilization review plan criteria under 42 U.S.C. 1395x(k) for Medicare.

(iv) Pursuant to 42 U.S.C. 1397j–1(b), the entities to which this paragraph (q)(2)(iv) applies shall not construe subtitle B of Title XX of the Social Security Act (42 U.S.C. 1397j–1397m–5) to interfere with or abridge an elder's right to practice his or her religion through reliance on prayer alone for healing when this choice:

(A) Is contemporaneously expressed, either orally or in writing, with respect to a specific illness or injury which the elder has at the time of the decision by an elder who is competent at the time of the decision;

(B) Is previously set forth in a living will, health care proxy, or other advance directive document that is validly executed and applied under State law; or

(C) May be unambiguously deduced from the elder's life history.

§ 88.4 Assurance and certification of compliance requirements.

(a) *In general*—(1) *Assurance.* Except for an application or recipient to which paragraph (c) of this section applies, every application for Federal financial assistance or Federal funds from the Department to which § 88.3 of this part applies shall, as a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds from the Department pursuant to the application, provide, contain, or be accompanied by an assurance that the applicant or recipient will comply with applicable Federal conscience and anti-discrimination laws and this part.

(2) *Certification.* Except for an application or recipient to which paragraph (c) of this section applies, every application for Federal financial assistance or Federal funds from the Department to which § 88.3 of this part applies, shall, as a condition of the approval, renewal, or extension of any Federal financial assistance or Federal funds from the Department pursuant to the application, provide, contain, or be accompanied by, a certification that the applicant or recipient will comply with applicable Federal conscience and anti-discrimination laws and this part.

(b) *Specific requirements*—(1) *Timing.* Entities who are already recipients as of the effective date of this part or any applicants shall submit the assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section as a condition of any application or reapplication for funds to which this part applies, through any instrument or as a condition of an amendment or modification of the instrument that extends the term of such instrument or adds additional funds to it. Submission may be required more frequently if:

(i) The applicant or recipient fails to meet a requirement of this part, or

(ii) OCR or the relevant Department component has reason to suspect or cause to investigate the possibility of such failure.

(2) *Form and manner.* Applicants or recipients shall submit the assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section in the form and manner that OCR, in coordination with the relevant Department component, specifies, or shall submit them in a separate writing signed by the applicant's or recipient's officer or other person authorized to bind the applicant or recipient.

(3) *Duration of obligation.* The assurance required in paragraph (a)(1) of this section and the certification required in paragraph (a)(2) of this section will obligate the recipient for the period during which the Department extends Federal financial assistance or Federal funds from the Department to a recipient.

(4) *Compliance requirement.* Submission of an assurance or certification required under this section will not relieve a recipient of the obligation to take and complete any action necessary to come into compliance with Federal conscience and anti-discrimination laws and this part prior to, at the time of, or subsequent to, the submission of such assurance or certification.

(5) *Condition of continued receipt.* Provision of a compliant assurance and certification shall constitute a condition of continued receipt of Federal financial assistance or Federal funds from the Department and is binding upon the applicant or recipient, its successors, assigns, or transferees for the period during which such Federal financial assistance or Federal funds from the Department are provided.

(6) *Assurances and certifications in applications.* An applicant or recipient may incorporate the assurances and

certifications by reference in subsequent applications to the Department or Department component if prior assurances or certifications are initially provided in the same fiscal or calendar year, as applicable.

(7) *Enforcement of assurances and certifications.* The Department, Department components, and OCR shall have the right to seek enforcement of the assurances and certifications required in this section.

(8) *Remedies for failure to make assurances and certifications.* If an applicant or recipient fails or refuses to furnish an assurance or certification required under this section, OCR, in coordination with the relevant Department component, may effect compliance by any of the mechanisms provided in § 88.7.

(c) *Exceptions.* The following persons or entities shall not be required to comply with paragraphs (a)(1) and (2) of this section, provided that such persons or entities are not recipients of Federal financial assistance or other Federal funds from the Department through another instrument, program, or mechanism, other than those set forth in paragraphs (c)(1) through (4) of this section:

(1) A physician, as defined in 42 U.S.C. 1395x(r), physician office, pharmacist, pharmacy, or other health care practitioner participating in Part B of the Medicare program;

(2) A recipient of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration for Children and Families, the purpose of which is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

(i) Medical or behavioral research;

(ii) Health care providers; or

(iii) Any significant likelihood of referral for the provision of health care;

(3) A recipient of Federal financial assistance or other Federal funds from the Department awarded under certain grant programs currently administered by the Administration on Community Living, the purpose of which is either solely financial assistance unrelated to health care or which is otherwise unrelated to health care provision, and which, in addition, does not involve—

(i) Medical or behavioral research;

(ii) Health care providers; or

(iii) Any significant likelihood of referral for the provision of health care.

(4) Indian Tribes and Tribal Organizations when contracting with the Indian Health Service under the Indian Self-Determination and Education Assistance Act.

§ 88.5 Notice of rights under Federal conscience and anti-discrimination laws.

(a) *In general.* In investigating a complaint or conducting a compliance review, OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part, to the extent such notices are provided according to the provisions of this section and are relevant to the particular investigation or compliance review.

(b) *Placement of the notice text.* In evaluating the Department's or a recipient's compliance with this part, OCR will take into account whether, as applicable and appropriate, the Department or recipient has provided the notice under this section:

(1) On the Department or recipient's website(s);

(2) In a prominent and conspicuous physical location in Department or recipient establishments where notices to the public and notices to its workforce are customarily posted to permit ready observation;

(3) In a personnel manual or other substantially similar document for members of the Department or recipient's workforce;

(4) In applications to the Department or recipient for inclusion in the workforce or for participation in a service, benefit, or other program, including for training or study; and

(5) In any student handbook or other substantially similar document for students participating in a program of training or study, including for post-graduate interns, residents, and fellows.

(6) Such that the text of the notice is large and conspicuous enough to be read easily and is presented in a format, location, or manner that impedes or prevents the notice being altered, defaced, removed, or covered by other material.

(c) *Content of the notice text.* The recipient and the Department should consider using the model text provided in Appendix A for the notice, but may tailor its notice to address its particular circumstances and to more specifically address the laws that apply to it under this rule.

(d) *Combined nondiscrimination notices.* The Department and each recipient may post the notice text provided in appendix A of this part, or a notice it drafts itself, along with the content of other notices (such as other non-discrimination notices).

§ 88.6 Compliance requirements.

(a) *In general.* The Department and each recipient has primary responsibility to ensure that it is in compliance with Federal conscience and anti-discrimination laws and this part, and shall take steps to eliminate any violations of the Federal conscience and anti-discrimination laws and this part. If a sub-recipient is found to have violated the Federal conscience and anti-discrimination laws, the recipient from whom the sub-recipient received funds may be subject to the imposition of funding restrictions or any appropriate remedies available under this part, depending on the facts and circumstances.

(b) *Records and information.* The Department, each recipient, and each sub-recipient shall maintain complete and accurate records evidencing compliance with Federal conscience and anti-discrimination laws and this part, and afford OCR, upon request, reasonable access to such records and information in a timely manner and to the extent OCR finds necessary to determine compliance with the Federal conscience and anti-discrimination laws and this part. Such records:

(1) Shall be maintained for a period of three years from the date the record was created or obtained by the recipient or sub-recipient;

(2) Shall contain any information maintained by the recipient or sub-recipient that pertains to discrimination on the basis of religious belief or moral conviction, including, without limitation, any complaints; statements, policies, or notices concerning discrimination on the basis of religious belief or moral conviction; procedures for accommodating employees' or other protected individuals' religious beliefs or moral convictions; and records of requests for such religious or moral accommodation and the recipient or sub-recipient's response to such requests; and

(3) May be maintained in any form and manner that affords OCR with reasonable access to them in a timely manner.

(c) *Cooperation.* The Department, each recipient, and each sub-recipient shall cooperate with any compliance review, investigation, interview, or other part of OCR's enforcement process, which may include production of documents, participation in interviews, response to data requests, and making available of premises for inspection where relevant. Failure to cooperate may result in an OCR referral to the Department of Justice, in coordination with the Department's Office of the General Counsel, for

further enforcement in Federal court or otherwise. Each recipient or sub-recipient shall permit access by OCR during normal business hours to such of its books, records, accounts, and other sources of information, as well as its facilities, as may be pertinent to ascertain compliance with this part. Asserted considerations of privacy or confidentiality may not operate to bar OCR from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance reviews, investigations, or other enforcement activities shall not be disclosed except as required in formal enforcement proceedings or as otherwise required by law.

(d) *Reporting requirement.* If a recipient or sub-recipient is subject to a determination by OCR of noncompliance with this part, the recipient or sub-recipient must, in any application for new or renewed Federal financial assistance or Departmental funding in the three years following such determination, disclose the existence of the determination of noncompliance. This includes a requirement that recipients disclose any OCR determinations made against their sub-recipients.

(e) *Intimidating or retaliatory acts prohibited.* Neither the Department nor any recipient or sub-recipient shall intimidate, threaten, coerce, or discriminate against any entity for the purpose of interfering with any right or privilege under the Federal conscience and anti-discrimination laws or this part, or because such entity has made a complaint or participated in any manner in an investigation or review under the Federal conscience and anti-discrimination laws or this part.

§ 88.7 Enforcement authority.

(a) *In general.* OCR has been delegated the authority to facilitate and coordinate the Department's enforcement of the Federal conscience and anti-discrimination laws, which includes the authority to:

(1) Receive and handle complaints;

(2) Initiate compliance reviews;

(3) Conduct investigations;

(4) Coordinate compliance within the Department;

(5) Seek voluntary resolutions of complaints;

(6) In coordination with the relevant component or components of the Department and the Office of the General Counsel, make enforcement referrals to the Department of Justice;

(7) In coordination with the relevant Departmental funding component, utilize existing regulations for involuntary enforcement, such as those that apply to grants, contracts, or CMS programs; and

(8) In coordination with the relevant component or components of the Department, coordinate other appropriate remedial action as the Department deems necessary and as allowed by law and applicable regulation.

(b) *Complaints.* Any entity, whether individually, as a member of a class, on behalf of others, or on behalf of an entity, may file a complaint with OCR alleging any potential violation of Federal conscience and anti-discrimination laws or this part. OCR shall coordinate handling of complaints with the relevant Department component(s). The complaint filer is not required to be the entity whose rights under the Federal conscience and anti-discrimination laws or this part have been potentially violated.

(c) *Compliance reviews.* OCR may conduct compliance reviews or use other similar procedures as necessary to permit OCR to investigate and review the practices of the Department, Department components, recipients, and sub-recipients to determine whether they are complying with Federal conscience and anti-discrimination laws and this part. OCR may initiate a compliance review of an entity subject to this part based on information from a complaint or other source that causes OCR to suspect non-compliance by such entity with this part or the laws implemented by this part.

(d) *Investigations.* OCR shall make a prompt investigation, whenever a compliance review, report, complaint, or any other information found by OCR indicates a threatened, potential, or actual failure to comply with Federal conscience and anti-discrimination laws or this part. The investigation should include, where appropriate, a review of the pertinent practices, policies, communications, documents, compliance history, circumstances under which the possible noncompliance occurred, and other factors relevant to determining whether the Department, Department component, recipient, or sub-recipient has failed to comply. OCR shall use fact-finding methods including site visits; interviews with the complainants, Department component, recipients, sub-recipients, or third-parties; and written data or discovery requests. OCR may seek the assistance of any State agency.

(e) *Failure to respond.* Absent good cause, the failure of an entity that is subject to this part to respond to a request for information or to a data or document request within 45 days of OCR's request shall constitute a violation of this part.

(f) *Related administrative or judicial proceeding.* Consistent with other applicable Federal laws, testimony and other evidence obtained in an investigation or compliance review conducted under this part may be used by the Department for, and offered into evidence in, any administrative or judicial proceeding related to this part.

(g) *Supervision and coordination.* If as a result of an investigation, compliance review, or other enforcement activity, OCR determines that a Department component appears to be in noncompliance with its responsibilities under Federal conscience and anti-discrimination laws or this part, OCR will undertake appropriate action with the component to assure compliance. In the event that OCR and the Department component are unable to agree on a resolution of any particular matter, the matter shall be submitted to the Secretary for resolution. OCR may from time to time request the assistance of officials of the Department in carrying out responsibilities in connection with the enforcement of Federal conscience and anti-discrimination laws and this part, including the achievement of effective coordination and maximum uniformity within the Department.

(h) *Referral to the Department of Justice.* If as a result of an investigation, compliance review, or other enforcement activity, OCR determines that a recipient or sub-recipient is not in compliance with the Federal conscience and anti-discrimination laws or this part, OCR may, in coordination with the relevant Department component and the Office of the General Counsel, make referrals to the Department of Justice, for further enforcement in Federal court or otherwise. OCR may also make referrals to the Department of Justice, in coordination with the Office of the General Counsel, concerning potential violations of 18 U.S.C. 1001 or 42 U.S.C. 300a–8 for enforcement or other appropriate action.

(i) *Resolution of matters.* (1) If an investigation or compliance review reveals that no action is warranted, OCR will so inform any party who has been notified of the existence of the investigation or compliance review, if any, in writing.

(2) If an investigation or compliance review indicates a failure to comply with Federal conscience and anti-discrimination laws or this part, OCR will so inform the relevant parties and the matter will be resolved by informal means whenever possible. Attempts to resolve matters informally shall not preclude OCR from simultaneously

pursuing any action described in paragraphs (a)(5) through (7) of this section.

(3) If OCR determines that there is a failure to comply with Federal conscience and anti-discrimination laws or this part, compliance with these laws and this part may be effected by the following actions, taken in coordination with the relevant Department component, and pursuant to statutes and regulations which govern the administration of contracts (*e.g.,* Federal Acquisition Regulation), grants (*e.g.,* 45 CFR part 75) and CMS funding arrangements (*e.g.,* the Social Security Act):

(i) Temporarily withholding Federal financial assistance or other Federal funds, in whole or in part, pending correction of the deficiency;

(ii) Denying use of Federal financial assistance or other Federal funds from the Department, including any applicable matching credit, in whole or in part;

(iii) Wholly or partly suspending award activities;

(iv) Terminating Federal financial assistance or other Federal funds from the Department, in whole or in part;

(v) Denying or withholding, in whole or in part, new Federal financial assistance or other Federal funds from the Department administered by or through the Secretary for which an application or approval is required, including renewal or continuation of existing programs or activities or authorization of new activities;

(vi) In coordination with the Office of the General Counsel, referring the matter to the Attorney General for proceedings to enforce any rights of the United States, or obligations of the recipient or sub-recipient, under Federal law or this part; and

(vii) Taking any other remedies that may be legally available.

(j) *Noncompliance with § 88.4.* If a recipient of Federal financial assistance or applicant therefor fails or refuses to furnish an assurance or certification required under § 88.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, OCR, in coordination with the relevant Department component, may effect compliance by any of the remedies provided in paragraph (i) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings brought under such paragraph.

§ 88.8 Relationship to other laws.

Nothing in this part shall be construed to preempt any Federal, State, or local law that is equally or more protective of religious freedom and moral convictions. Nothing in this part shall be construed to narrow the meaning or application of any State or Federal law protecting free exercise of religious beliefs or moral convictions.

§ 88.9 Rule of construction.

This part shall be construed in favor of a broad protection of the free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the Constitution and the terms of the Federal conscience and anti-discrimination laws.

§ 88.10 Severability.

Any provision of this part held to be invalid or unenforceable either by its terms or as applied to any entity or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be severable from this part, which shall remain in full force and effect to the maximum extent permitted by law. A severed provision shall not affect the remainder of this part or the application of the provision to other persons or entities not similarly situated or to other, dissimilar circumstances.

Appendix A to Part 88—Model Text: Notice of Rights Under Federal Conscience and Anti-Discrimination Laws

[Name of recipient, the Department, or Department component] complies with applicable Federal conscience and anti-discrimination laws prohibiting exclusion, adverse treatment, coercion, or other discrimination against individuals or entities on the basis of their religious beliefs or moral convictions. You may have the right under Federal law to decline to perform, assist in the performance of, refer for, undergo, or pay for certain health care-related treatments, research, or services (such as abortion or assisted suicide, among others) that violate your conscience, religious beliefs, or moral convictions.

If you believe that [Name of recipient, the Department, or Department component] has failed to accommodate your conscientious, religious, or moral objection, or has discriminated against you on those grounds, you can file a conscience and religious freedom complaint with the U.S. Department of Health and Human Services, Office for Civil Rights, electronically through the Office for Civil Rights Complaint Portal, available at *https://ocrportal.hhs.gov/ocr/portal/lobby.jsf* or by mail or phone at: U.S. Department of Health and Human Services, 200 Independence Avenue SW, Room 509F, HHH Building Washington, DC 20201, 1–800–368–1019, 800–537–7697 (TDD). Complaint forms and more information about Federal conscience and anti-discrimination laws are available at *http://www.hhs.gov/conscience.*

Dated: May 2, 2019.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2019–09667 Filed 5–20–19; 8:45 am]

BILLING CODE 4153–01–P

FEDERAL REGISTER

Vol. 84 Tuesday,
No. 98 May 21, 2019

Part III

Bureau of Consumer Financial Protection

12 CFR Part 1006
Debt Collection Practices (Regulation F); Proposed Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

[Docket No. CFPB–2019–0022]

RIN 3170–AA41

Debt Collection Practices (Regulation F)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) proposes to amend Regulation F, 12 CFR part 1006, which implements the Fair Debt Collection Practices Act (FDCPA) and currently contains the procedures for State application for exemption from the provisions of the FDCPA. The Bureau's proposal would amend Regulation F to prescribe Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA. The Bureau's proposal would, among other things, address communications in connection with debt collection; interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and clarify requirements for certain consumer-facing debt collection disclosures.

DATES: Comments must be received on or before August 19, 2019.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2019–0022 or RIN 3170–AA41, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: 2019-NPRM-DebtCollection@cfpb.gov*. Include Docket No. CFPB–2019–0022 or RIN 3170–AA41 in the subject line of the email.
- *Mail:* Comment Intake—Debt Collection, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.
- *Hand Delivery/Courier:* Comment Intake—Debt Collection, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary or sensitive personal information, such as account numbers, Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Adam Mayle, Counsel; or Dania Ayoubi, Owen Bonheimer, Seth Caffrey, David Hixson, David Jacobs, Courtney Jean, or Kristin McPartland, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The Bureau proposes to amend Regulation F, which implements the Fair Debt Collection Practices Act (FDCPA),[1] to prescribe Federal rules governing the activities of debt collectors, as that term is defined in the FDCPA (FDCPA-covered debt collectors). The proposal focuses on debt collection communications and disclosures and also addresses related practices by debt collectors. The Bureau also proposes that FDCPA-covered debt collectors comply with certain additional disclosure-related and record retention requirements pursuant to the Bureau's rulemaking authority under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[2]

In 1977, Congress passed the FDCPA to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[3] The statute was a response to ''abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.'' [4] According to Congress, these practices ''contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [5]

The FDCPA established certain consumer protections, but interpretative questions have arisen since its passage. Some questions, including those related to communication technologies that did not exist at the time the FDCPA was passed (such as mobile telephones, email, and text messaging), have been the subject of inconsistent court decisions, resulting in legal uncertainty and additional cost for industry and risk for consumers. As the first Federal agency with authority under the FDCPA to prescribe substantive rules with respect to the collection of debts by debt collectors, the Bureau proposes to clarify how debt collectors may employ such newer communication technologies in compliance with the FDCPA and to address other communications-related practices that may pose a risk of harm to consumers and create legal uncertainty for industry. The Bureau also proposes to interpret the FDCPA's consumer disclosure requirements to clarify how industry participants can comply with the law and to assist consumers in making better-informed decisions about debts they owe or allegedly owe.[6]

A. Coverage and Organization of the Proposed Rule

The Bureau's proposed rule is based primarily on its authority to issue rules to implement the FDCPA. Consequently, the proposal generally would impose requirements on debt collectors, as that term is defined in the FDCPA. However, the Bureau proposes certain provisions of the regulation based on the Bureau's Dodd-Frank Act rulemaking authority. With respect to debt collection, the Bureau's authority under the Dodd-Frank Act generally may address the conduct of those who collect debt related to a consumer financial product or service, as that term is defined in the Dodd-Frank Act.[7] Proposed rule

[1] 15 U.S.C. 1692–1692p.

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] 15 U.S.C. 1692(e).

[4] 15 U.S.C. 1692(a).

[5] *Id.*

[6] Because this is a proposed rule, the Bureau's statements herein regarding proposed interpretations of the FDCPA or the Dodd-Frank Act do not represent final Bureau interpretations. The Bureau is not, through its proposed interpretations, finding that conduct either violates or is permissible under the FDCPA or the Dodd-Frank Act.

[7] Covered persons under the Dodd-Frank Act include persons who are ''engage[d] in offering or providing a consumer financial product or service''; this generally includes persons who are ''collecting debt related to any consumer financial product or service'' (*e.g.,* debt related to the extension of consumer credit). *See* 12 U.S.C. 5481(5), (6), (15)(A)(i), (x).

provisions that rely on the Bureau's Dodd-Frank Act rulemaking authority generally would not, therefore, require FDCPA-covered debt collectors to comply if they are not collecting debt related to a consumer financial product or service.[8] Such FDCPA-covered debt collectors, however, would not violate the FDCPA by complying with any such provisions adopted in a final rule.

The proposed rule restates the FDCPA's substantive provisions largely in the order that they appear in the statute, sometimes without further interpretation. Restating the statutory text of all of the substantive provisions may facilitate understanding and compliance by ensuring that stakeholders need to consult only the regulation to view all relevant definitions and substantive provisions. Where the Bureau proposes to restate statutory text without further interpretation, the relevant section-by-section analysis explains that the proposed rule restates the statutory language with only minor wording or organizational changes for clarity. Except where specifically stated, the Bureau does not intend to codify existing case law or judicial interpretations of the statute by restating the statutory text. The Bureau requests comment on the proposed approach of restating the substantive provisions of the FDCPA.

The proposed rule has four subparts. Subpart A contains generally applicable provisions, such as definitions that would apply throughout the regulation. Subpart B contains proposed rules for FDCPA-covered debt collectors. Subpart C is reserved for any future debt collection rulemakings. Subpart D contains certain miscellaneous provisions.

B. Scope of the Proposed Rule

Communications Proposals

Debt collection efforts often begin with attempts by a debt collector to reach a consumer. Communicating with a debt collector may benefit a consumer by helping the consumer to either resolve a debt the consumer owes, or identify and inform the debt collector if the debt is one that the consumer does not owe. However, debt collection communications also may constitute unfair practices, may contain false or misleading representations, or may be harassing or abusive either because of their content (for example, when debt collectors employ profanity) or because of the manner in which they are made (for example, when debt collectors place excessive telephone calls with the intent to harass or abuse).

Communication technology has evolved significantly since the FDCPA was enacted in 1977. Today, consumers may prefer communicating with debt collectors using newer technologies, such as emails, text messages, or web portals, because these technologies may offer greater efficiency, convenience, and privacy. These technologies also may allow consumers to exert greater control over the timing, frequency, and duration of communications with debt collectors—for example, by choosing when, where, and how much time to spend responding to a debt collector's email. Debt collectors also may find that these technologies are a more effective and efficient means of communicating with consumers.

To address concerns about debt collection communications and to clarify the application of the FDCPA to newer communication technologies, the Bureau proposes to:

- Define a new term related to debt collection communications: Limited-content message. This definition would identify what information a debt collector must and may include in a message left for consumers (with the inclusion of no other information permitted) for the message to be deemed not to be a communication under the FDCPA. This definition would permit a debt collector to leave a message for a consumer without communicating, as defined by the FDCPA, with a person other than the consumer.
- Clarify the times and places at which a debt collector may communicate with a consumer, including by clarifying that a consumer need not use specific words to assert that a time or place is inconvenient for debt collection communications.
- Clarify that a consumer may restrict the media through which a debt collector communicates by designating a particular medium, such as email, as one that cannot be used for debt collection communications.
- Clarify that, subject to certain exceptions, a debt collector is prohibited from placing a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person.
- Clarify that newer communication technologies, such as emails and text messages, may be used in debt collection, with certain limitations to protect consumer privacy and to prevent harassment or abuse, false or misleading representations, or unfair practices. For example, the Bureau proposes to require that a debt collector's emails and text messages include instructions for a consumer to opt out of receiving further emails or text messages. The Bureau also proposes procedures that, when followed, would protect a debt collector from liability for unintentional violations of the prohibition against third-party disclosures when communicating with a consumer by email or text message.

Consumer Disclosure Proposals

The FDCPA requires that a debt collector send a written notice to a consumer, within five days of the initial communication, containing certain information about the debt and actions the consumer may take in response, unless such information was provided in the initial communication or the consumer has paid the debt. To clarify the information that a debt collector must provide to a consumer at the outset of debt collection, including (if applicable) in a validation notice, the Bureau proposes:

- To specify that debt collectors must provide certain information about the debt and the consumer's rights with respect to the debt. The Bureau also proposes to require a debt collector to provide prompts that a consumer could use to dispute the debt, request information about the original creditor, or take certain other actions. The Bureau also proposes to permit a debt collector to include certain optional information.
- A model validation notice that a debt collector could use to comply with the FDCPA and the proposed rule's disclosure requirements.
- To clarify the steps a debt collector must take to provide the validation notice and other required disclosures electronically.
- A safe harbor if a debt collector complies with certain steps when delivering the validation notice within the body of an email that is the debt collector's initial communication with the consumer.

The Bureau also proposes to prohibit a debt collector from suing or threatening to sue a consumer to collect a time-barred debt. The Bureau plans to test consumer disclosures related to time-barred debt and, after testing, will

[8] These provisions appear in proposed §§ 1006.14(b)(1)(ii) (repeated or continuous telephone calls or telephone conversations), 1006.30(b)(1)(ii) (prohibition on the sale, transfer, or placement of certain debts), and 1006.34(c)(2)(iv) (certain information about the debt) and (3)(iv) (certain information about consumer protections). Note that proposed §§ 1006.14(b)(1)(i) and 1006.30(b)(1)(i) would prohibit the same conduct by all FDCPA-covered debt collectors that proposed §§ 1006.14(b)(1)(ii) and 1006.30(b)(1)(ii) would prohibit only for FDCPA-covered debt collectors collecting consumer financial product or service debt. Additionally, the record retention requirement in § 1006.100 is proposed only pursuant to Dodd-Frank Act rulemaking authority but would apply to all FDCPA-covered debt collectors.

assess whether a debt collector who collects a time-barred debt must disclose that the debt collector cannot sue to collect the debt because of its age. At a later date, the Bureau may release a report on such testing and issue a disclosure proposal related to the collection of time-barred debt. Stakeholders will have an opportunity to comment on such testing if the Bureau intends to use it to support disclosure requirements in a final rule.

Additional Proposals

The Bureau proposes to address certain other consumer protection concerns in the debt collection market. For example, the Bureau proposes:

- To clarify that the personal representative of a deceased consumer's estate is a consumer for purposes of proposed § 1006.6, which addresses communications in connection with debt collection. This clarification generally would allow a debt collector to discuss a debt with the personal representative of a deceased consumer's estate. The Bureau also proposes to clarify how a debt collector may locate the personal representative of a deceased consumer's estate. In addition, the proposed rule would interpret the requirement that a debt collector provide the validation notice to a ''consumer'' to require the notice be provided to the person acting on behalf of a deceased consumer's estate, *i.e.,* the executor, administrator, or personal representative of a deceased consumer's estate, who would have the right to dispute the debt.
- To prohibit a debt collector from furnishing information about a debt to a consumer reporting agency before communicating with the consumer about the debt.
- To prohibit, with certain exceptions, the sale, transfer, or placement for collection of a debt if a debt collector knows or should know that the debt has been paid or settled or has been discharged in bankruptcy, or that an identity theft report has been filed with respect to the debt.

The Bureau requests comment on all aspects of the proposed rule.

C. Effective Date

The Bureau proposes that the effective date of the final rule would be one year after the final rule is published in the **Federal Register**. The Bureau requests comment on this proposed effective date.

II. Background

A. Debt Collection Market Background

A consumer debt is commonly understood to be a consumer's obligation to pay money to another person or entity. Sometimes a debt arises out of a closed-end loan. At other times, a debt arises from a consumer's use of an open-end line of credit, most commonly a credit card. And in other cases, a debt arises from a consumer's purchase of goods or services with payment due thereafter. Often there is an agreed-upon payment schedule or date by which the consumer must repay the debt.

For a variety of reasons, consumers sometimes are unable (or in some instances unwilling) to make payments when they are due. Collection efforts may directly recover some or all of the overdue amounts owed to debt owners and thereby may indirectly help to keep consumer credit available and more affordable to consumers.[9] Collection activities also can lead to repayment plans or debt restructuring that may provide consumers with additional time to make payments or resolve their debts on more manageable terms.[10]

The debt collection industry includes creditors, third-party debt collectors (including debt collection law firms), debt buyers, and a wide variety of related service providers. Debt collection is estimated to be an $11.5 billion-dollar industry employing nearly 118,500 people across approximately 7,700 collection agencies in the United States.[11]

Creditors

When an account becomes delinquent, initial collection efforts often are undertaken by the original creditor or its servicer. The FDCPA typically does not cover these first-party recovery efforts. If these first-party recovery efforts result in resolution of the debt, whether through payment in full or another arrangement, the consumer typically will not interact with a third-party debt collector.

Third-Party Debt Collectors

If a consumer's payment obligations remain unmet, a creditor may send the account to a third-party debt collector to recover on the debt in the third-party debt collector's name. A creditor may choose to send an account to a third-party debt collector for several reasons, including because the third-party debt collector possesses capabilities and expertise that the creditor lacks. Third-party debt collectors usually are paid on a contingency basis, typically a percentage of recoveries; debt collectors contracting with creditors on a contingency basis generated a large majority of the industry's 2018 revenue.[12] Contingency debt collectors compete with one another to secure business from creditors based on, among other factors, the debt collectors' effectiveness in obtaining recoveries.[13]

Debt Buyers

If contingency collections prove unsuccessful—or if a particular creditor prefers not to use such third-party debt collectors—a creditor may sell unpaid accounts to a debt buyer. In 2009, the Federal Trade Commission (FTC) called the advent and growth of debt buying ''the most significant change in the debt collection business'' in recent years.[14] Debt buyers purchase defaulted debt from creditors or other debt owners and thereby take title to the debt. Credit card debt comprises a large majority of the debt that debt buyers purchase.[15] Debt buyers generated about one-third of debt collection revenue, or about $3.5 billion, in 2017.[16] Creditors who sell their uncollected debt to debt buyers receive a certain up-front return, but these debts typically are sold at prices that are a fraction of their face value. Debt buyers typically price their offers for portfolios based upon their projections of the amount they will be able to collect. The debt buyer incurs the risk of recovering

[9] *See* Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2013,* at 9 (Mar. 2013), *https://www.consumerfinance.gov/data-research/research-reports/annual-report-on-the-fair-debt-collection-practices-act/* (hereinafter 2013 FDCPA Annual Report).

[10] *See id.*

[11] *See* Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2019,* at 8 (Mar. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2019.pdf* (hereinafter 2019 FDCPA Annual Report).

[12] *Id.* at 10.

[13] While third-party collection agencies have been increasing in size in recent years, third-party debt collection continues to include a significant number of smaller entities. *See* Robert M. Hunt, *Understanding the Model: The Life Cycle of a Debt,* at 15, Fed. Reserve Bank of Phila. (June 6, 2013), *https://www.ftc.gov/sites/default/files/documents/public_events/life-debt-data-integrity-debt-collection/understandingthemodel.pdf.*

[14] Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry,* at i (2013), *https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf* (hereinafter FTC Debt Buying Report).

[15] *Id.* at 7 (citing *Credit Card Debt Sales in 2008,* 921 Nilson Rep. 10 (Mar. 2009)).

[16] Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2018,* at 10 (Mar. 2018), *https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_03-2018.pdf* (hereinafter 2018 FDCPA Annual Report) (citing Edward Rivera, *Debt Collection Agencies in the US,* IBIS World (Dec. 2017)). Although debt buyers represent about one-third of industry revenue, this overstates debt buyers' share of dollars collected, since debt buyer revenue includes all amounts recovered, whereas the revenue of contingency debt collectors includes only the share of recoveries retained by the debt collector. *Id.*

less than the sum of the amount it paid to acquire the debt and its expenses to collect the debt.

Typically a debt buyer engages in debt collection, attempting to collect debts itself. However, a debt buyer also may use a third-party debt collector or a series of such debt collectors. If the debt buyer is unable to collect some of the debts it purchased, the debt buyer may sell the debt again to another debt buyer. Any single debt thus may be owned by multiple entities over its lifetime. The price paid for a debt generally will decline as the debt ages and passes from debt buyer to debt buyer, because the probability of payment decreases.[17]

Debt Collection Law Firms

If debt collection attempts are unsuccessful, a debt owner may try to recover on a debt through litigation. Most debt collection litigation is filed in State courts. Debt owners often retain law firms and attorneys that specialize in debt collection and that are familiar with State and local rules. If a debt owner obtains a judgment in its favor, post-litigation efforts may include garnishment of wages or seizure of assets.

B. Debt Collection Methods

The debt collection experience is a common one—approximately one in three consumers with a credit record reported having been contacted about a debt in collection in 2014.[18] Of those, 27 percent reported having been contacted about a single debt over the prior year, 57 percent reported having been contacted about two to four debts, and 16 percent reported having been contacted about more than four debts.[19]

A creditor typically stops communicating with a consumer once responsibility for an account has moved to a third-party debt collector. Active debt collection efforts typically begin with the debt collector attempting to locate the consumer, usually by identifying a valid telephone number or mailing address, so that the debt collector can establish contact with the consumer. To obtain current contact information, a debt collector may look to information that transferred with the account file, public records, data sellers, or proprietary databases of contact information. A debt collector may also attempt to obtain location information for a consumer from third parties, such as family members who share a residence with the consumer or colleagues at the consumer's workplace.

Once a debt collector has obtained contact information for a consumer, the debt collector typically will seek to communicate with the consumer to obtain payment on some or all of the debt. The debt collector may tailor the collection strategy depending on a variety of factors, including the size and age of the debt and the debt collector's assessment of the likelihood of obtaining money from the consumer. For example, rather than affirmatively locating and contacting consumers, some debt collectors collecting relatively small debts—such as many medical, utility, and telecommunications debts—will report the debts to consumer reporting agencies (CRAs) and then wait for consumers to contact them after discovering the debts on their consumer reports.[20] Other types of debt are subject to statutory or regulatory requirements that may affect how a debt collector tries to recover on them. For example, privacy protections may affect how a debt collector seeks to recover on a medical debt, and the availability of administrative wage garnishment and tax refund intercepts may affect how a debt collector seeks to recover on a Federal student loan.

Changes in a consumer's situation may warrant a change in a debt collector's recovery strategy, such as when information purchased from CRAs or other third parties indicates that the consumer has started a new job. A debt owner also may ''warehouse'' a debt and cease collection efforts for a significant period. A new debt collector may later be tasked with resuming collection efforts because, for example, the debt owner has sold the account, detected a possible change in the consumer's financial situation, or wishes to make periodic attempts at some recovery. Each time a new debt collector obtains responsibility for collecting the debt, the consumer likely will be subject to communications or communication attempts from the new debt collector. For the consumer, this may mean contact from a series of different debt collectors over a number of years. During this time, the consumer may make payments to multiple debt collectors or may receive communication attempts from multiple debt collectors that may stop and restart at irregular intervals, until the debt is paid or settled in full or collection activity ceases for other reasons.

C. Consumer Protection Concerns

Each year, consumers submit tens of thousands of complaints about debt collection to Federal regulators;[21] many of those complaints relate to practices addressed in the proposed rule. Consumers also file thousands of private actions each year against debt collectors who allegedly have violated the FDCPA. Since the Bureau began operations in 2011, it has brought numerous debt collection cases against third-party debt collectors, alleging both FDCPA violations and unfair, deceptive, or abusive debt collection acts or practices in violation of the Dodd-Frank Act.[22] In these cases, the Bureau has ordered civil penalties, monetary compensation for consumers, and other relief. In its supervisory work, the Bureau similarly has identified many FDCPA violations during examinations of debt collectors. Over the past decade, the FTC and State regulators also have brought numerous additional actions against debt collectors for violating Federal and State

[17] FTC Debt Buying Report, *supra* note 14, at 23–24.

[18] Bureau of Consumer Fin. Prot., *Consumer Experience with Debt Collection: Findings from CFPB's Survey of Consumer Views on Debt,* at 5 (2017), *http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf* (hereinafter CFPB Debt Collection Consumer Survey). This figure includes consumers contacted only by creditors as well as those contacted by one or more debt collection firms. *Id.* at 13.

[19] *Id.* at 13.

[20] Bureau of Consumer Fin. Prot., *Consumer Credit Reports: A Study of Medical and Non-Medical Collections,* at 35–36 (2014), *http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf* (hereinafter CFPB Medical Debt Report).

[21] *See, e.g.,* 2019 FDCPA Annual Report, *supra* note 11, at 15–16; Fed. Trade Comm'n, *2018 Consumer Sentinel Network Databook,* at 4, 7 (Feb. 2019), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2018/consumer_sentinel_network_data_book_2018_0.pdf*; 2018 FDCPA Annual Report, *supra* note 16, at 14–15; Fed. Trade Comm'n, *2017 Consumer Sentinel Network Databook,* at 3, 6 (Mar. 2018), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf*; Bureau of Consumer Fin. Prot., *2017 Fair Debt Collection Practices Act: CFPB Annual Report 2017,* at 15–16 (Mar. 2017), *https://files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf* (hereinafter 2017 FDCPA Annual Report); Fed. Trade Comm'n, *Consumer Sentinel Network Data Book for January–December 2016,* at 3, 6 (Mar. 2017), *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf.*

[22] *See, e.g.,* Consent Order, *In re Encore Capital Grp.,* 2015–CFPB–0022 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf*; Consent Order, *In re Portfolio Recovery Assocs., LLC,* 2015–CFPB–0023 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf*; Complaint, *Consumer Fin. Prot. Bureau* v. *Nat'l Corrective Grp., Inc.,* 1:15–cv–00899–RDB (D. Md. Mar. 30, 2015), *http://files.consumerfinance.gov/f/201503_cfpb_complaint-national-corrective-group.pdf.*

debt collection and consumer protection laws.

D. FDCPA and Dodd-Frank Act Protections for Consumers

Federal and State governments historically have sought to protect consumers from harmful debt collection practices. From 1938 to 1977, the Federal government primarily protected consumers through FTC enforcement actions against debt collectors who engaged in unfair or deceptive acts or practices in violation of section 5 of the FTC Act.[23] When Congress enacted the FDCPA in 1977, it found that ''[e]xisting laws and procedures for redressing . . . injuries [were] inadequate to protect consumers.'' [24] Congress found that ''[t]here [was] abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors,'' and that these practices ''contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.'' [25]

The FDCPA was enacted, in part, ''to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.'' [26] Among other things, the FDCPA: (1) Prohibits debt collectors from engaging in harassment or abuse, making false or misleading representations, and engaging in unfair practices in debt collection; (2) restricts debt collectors' communications with consumers and others; and (3) requires debt collectors to provide consumers with disclosures concerning the debts they owe or allegedly owe.

Until the creation of the Bureau, no Federal agency was authorized to issue regulations to implement the substantive provisions of the FDCPA. Courts have issued opinions providing differing interpretations of various FDCPA provisions, and there is considerable uncertainty with respect to how the FDCPA applies to communication technologies that did not exist in 1977. Further, to reduce legal risk, debt collectors typically use the language of the statute in making required disclosures, even though that language can be difficult for consumers to understand.

The Dodd-Frank Act amended the FDCPA to provide the Bureau with authority to ''prescribe rules with respect to the collection of debts by debt collectors.'' [27] Section 1031 of the Dodd-Frank Act also authorizes the Bureau, among other things, to prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[28] Section 1031(b) provides that rules under section 1031 may include requirements for the purpose of preventing such unfair, deceptive, or abusive acts or practices.[29] Covered persons under the Dodd-Frank Act include persons who are ''engage[d] in offering or providing a consumer financial product or service''; [30] this generally includes persons who are ''collecting debt related to any consumer financial product or service'' (*e.g.,* debt related to the extension of consumer credit).[31] Covered persons under the Dodd-Frank Act thus include many FDCPA-covered debt collectors, as well as many creditors and their servicers, who are collecting debt related to a consumer financial product or service.

III. The Rulemaking Process

The Bureau has conducted a wide range of outreach on the scope and substance of this proposed rule, including by holding field hearings,[32] hosting two joint roundtables with the FTC,[33] and issuing an Advance Notice of Proposed Rulemaking (ANPRM) in November 2013.[34] The Bureau has conducted several rounds of qualitative testing of prototype debt collection disclosure forms and has conducted formal and informal surveys over the past several years to obtain a more comprehensive and systematic understanding of debt collection practices. The Bureau also convened a Small Business Review Panel in August 2016 to obtain feedback from small debt collectors. Since the Bureau began studying this market, the Bureau has met on many occasions with various stakeholders, including consumer advocacy groups, debt collection trade associations, industry participants, academics with expertise in debt collection, Federal prudential regulators, and other Federal and State consumer protection regulators. The Bureau also received a number of comments specific to the debt collection rulemaking in response to its Request for Information Regarding the Bureau's Adopted Regulations and New Rulemaking Authorities [35] and its Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities,[36] and the Bureau has considered these comments in developing the proposed rule. In addition, the Bureau has engaged in general outreach, speaking at consumer advocacy group and industry events and visiting consumer organizations and industry stakeholders. The Bureau has provided other regulators with information about the proposed rule, has sought their input, and has received feedback that has helped the Bureau to prepare this proposed rule.

A. 2013 Advance Notice of Proposed Rulemaking

The Bureau issued an ANPRM regarding debt collection in November of 2013. The ANPRM sought information about both first- and third-party debt collection practices, including: Debt collectors' communication and calling practices; the use of disclosures, such as time-barred debt disclosures, in debt collection; the quantity and quality of information in the debt collection system; credit reporting by debt collectors; the prevalence and use of litigation by debt collectors, including by debt collection attorneys; and record retention, monitoring, and compliance issues.

The Bureau received more than 23,000 comments in response to the ANPRM, with approximately 379 non-form comments submitted. These non-form comments were provided by consumers, consumer advocacy groups,

[23] 15 U.S.C. 45.

[24] 15 U.S.C. 1692(b).

[25] 15 U.S.C. 1692(a).

[26] 15 U.S.C. 1692(e).

[27] 15 U.S.C. 1692*l*(d).

[28] Dodd-Frank Act section 1031(b), 12 U.S.C. 5531(b).

[29] *Id.*

[30] 12 U.S.C. 5481(6).

[31] 12 U.S.C. 5481(5), (15)(A)(i), (x).

[32] *See* Bureau of Consumer Fin. Prot., *Field Hearing on Debt Collection in Seattle, WA* (Oct. 24, 2012), *https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-on-deft-collection-from-seattle-washington/*; Bureau of Consumer Fin. Prot., *Field Hearing on Debt Collection in Portland, ME* (July 10, 2013), *https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-debt-collection-portland-me/*; Bureau of Consumer Fin. Prot., *Field Hearing on Debt Collection in Sacramento, CA* (July 28, 2016), *https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-debt-collection-sacramento-calif/*.

[33] Fed. Trade Comm'n & Bureau of Consumer Fin. Prot., *Debt Collection and the Latino Community: An FTC–CFPB Roundtable* (Oct. 23, 2014), *https://www.ftc.gov/news-events/events-calendar/2014/10/debt-collection-latino-community-roundtable*; Fed. Trade Comm'n & Bureau of Consumer Fin. Prot., *Roundtable on Data Integrity in Debt Collection: Life of a Debt* (July 6, 2013), *https://www.ftc.gov/system/files/documents/public_events/71120/life-debt-roundtable-transcript.pdf*.

[34] 78 FR 67848 (Nov. 12, 2013).

[35] 83 FR 12286 (Mar. 21, 2018).

[36] 83 FR 12881 (Mar. 26, 2018).

industry participants and trade associations, legal groups including law school clinics, State Attorneys General, and other stakeholders. The Bureau also worked with Cornell University's Regulation Room, which interacted with consumers to obtain their input and submitted a consolidated comment representing views from a multitude of consumers. Comments on the ANPRM related to both first- and third-party collection efforts. Commenters provided significant feedback regarding debt collector communication practices and interactions with consumers, consumer disclosures, and the use of newer communication technologies. Specific comments are discussed in more detail in part V where relevant.

B. Consumer Testing

The Bureau contracted with a third-party vendor, Fors Marsh Group (FMG), to assist with developing, and to conduct qualitative consumer testing of, two potential consumer-facing debt collection model disclosure forms: The validation notice and the statement of consumer rights. The Bureau sought insight into consumers' existing understanding of debt collection protections and how consumers would interact with the forms if they were adopted in a final rule. Specific findings from the consumer testing are discussed in more detail in part V where relevant.[37]

Validation Notice Testing

Focus groups. FMG facilitated five focus groups in July 2014 to assess consumers' thoughts about debt collectors and debt collection, to evaluate their perceptions of disclosures provided by debt collectors, and to measure their understanding of consumers' rights in debt collection. Two focus groups, one consisting of participants who had been contacted by a debt collector within the previous two years and one consisting of participants without such experience, were held in Arlington, Virginia, on July 16, 2014. Three focus groups, two consisting of participants with debt collection experience and one consisting of participants without debt collection experience, were held in New Orleans, Louisiana, on July 29, 2014. In conjunction with the release of this proposal, the Bureau is making available a report prepared by FMG regarding the focus group testing (FMG Focus Group Report).[38]

Cognitive Testing. FMG also conducted 30 one-on-one interviews of consumers to assess their perceptions, preferences, and understanding of different validation notices and to evaluate how each of the notices might affect consumer behavior. The interviews took place at three locations: Arlington, Virginia, on September 23 and 24, 2014; Minneapolis, Minnesota, on October 9 through 11, 2014; and Las Vegas, Nevada, on October 23 and 24, 2014. At each location, FMG interviewed 10 participants, seven of whom had debt collection experience and three of whom did not.

FMG tested three validation notices at each location. The first form was modeled closely on validation notices commonly used by debt collectors. The form included the disclosures specifically required by FDCPA section 809(a), and the language on the form generally mirrored the statutory language. The second form provided the same information as the first form, but in plainer language. The third form used the same language as the second form, along with additional information, including consumer protection information, chain-of-title information describing the history of the debt, and, for two of the testing locations, information about time-barred debts.

FMG asked the participants to define, locate, and explain the meaning of specific elements on each form. Participants responded to three surveys, each with three Likert-scale questions.[39] Participants were asked to compare the first and second forms side-by-side and were asked targeted questions about what they would do after reading individual elements of each notice. In conjunction with the release of this proposal, the Bureau is making available a report prepared by FMG regarding the cognitive testing (FMG Cognitive Report).[40]

Usability Testing. FMG also conducted 30 additional one-on-one interviews of consumers to assess their perceptions, preferences, and understanding of different model validation notices and to evaluate what influence, if any, these forms could have on their behavior. FMG interviewed 23 consumers who had been contacted by a debt collector within the previous two years and seven without such experience. The interviews took place at three locations: Arlington, Virginia, on March 31 and April 1, 2015; Minneapolis, Minnesota, on April 14 and 15, 2015; and Las Vegas, Nevada, on April 28 and 29, 2015. During the interviews, researchers asked participants comprehension questions to determine their understanding of the forms and debriefing questions to establish their reactions to and perceptions of the forms. Researchers also engaged consumers in testing activities to assess their interactions with the forms. In conjunction with the release of this proposal, the Bureau is making available a report prepared by FMG regarding the usability testing (FMG Usability Report).[41] The Bureau also is making available a report prepared by FMG summarizing the focus group testing, cognitive testing, and usability testing (FMG Summary Report).[42]

Quantitative Testing

The Bureau plans to conduct a web survey of 8,000 individuals possessing a broad range of demographic characteristics. The survey will explore consumer comprehension and decision-making in response to sample debt collection disclosures relating to time-

[37] While the Bureau tested a statement of consumer rights disclosure, this proposal would not require debt collectors to provide such a disclosure to consumers. Instead, the Bureau proposes to require certain debt collectors to provide on the validation notice a statement referring consumers to a Bureau-provided website that would describe certain consumer protections in debt collection. See the section-by-section analysis of proposed § 1006.34(c)(3)(iv). Because the Bureau does not propose to require debt collectors to provide consumers with a statement of consumer rights disclosure, the Bureau does not summarize testing related to that disclosure in this proposal.

[38] *See generally* Fors Marsh Grp., *Debt Collection Focus Groups* (Aug. 2014), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-focus-group-report.pdf* (hereinafter FMG Focus Group Report). The focus group testing was conducted in accordance with OMB control number 3170–0022, Generic Information Collection Plan for the Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials.

[39] A Likert-scale is a commonly used research scale that asks respondents to specify their level of agreement or disagreement with a series of statements.

[40] *See generally* Fors Marsh Grp., *Debt Collection Cognitive Interviews* (n.d.), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-cognitive-report.pdf* (hereinafter FMG Cognitive Report). The cognitive testing was conducted in accordance with OMB control number 3170–0022, Generic Information Collection Plan for the Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials.

[41] *See generally* Fors Marsh Grp., *Debt Collection User Experience Study* (Feb. 2016), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-usability-report.pdf* (hereinafter FMG Usability Report). Like the other testing, the usability testing was conducted in accordance with OMB control number 3170–0022, Generic Information Collection Plan for the Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials.

[42] *See generally* Fors Marsh Grp., *Debt Collection Validation Notice Research: Summary of Focus Groups, Cognitive Interviews, and User Experience Testing* (Feb. 2016), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collection_fmg-summary-report.pdf* (hereinafter FMG Summary Report).

barred debts. The Bureau will use the information it gathers to help assess how the Bureau may improve the clarity and effectiveness of debt collection disclosures, among other things. On February 4, 2019, in accordance with the Paperwork Reduction Act of 1995,[43] the Bureau proposed an information collection that described the web survey and was open for public comment for 30 days.[44] The comment period closed on March 6, 2019. This request is pending under OMB review and can be viewed on OMB's electronic docket at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201902-3170-001* (see ICR Reference Number 201902–3170–001). Stakeholders will have an opportunity to comment on a report describing the web survey results if the Bureau proposes to use those results to support disclosure requirements in a final rule.

C. Study of Debt Collection Market Operations

To better understand the operational costs of debt collection firms, including law firms, the Bureau surveyed debt collection firms and vendors and published a report based on that study in July 2016 (CFPB Debt Collection Operations Study or Operations Study).[45] The answers to the survey questions aided the Bureau's understanding of the compliance costs to debt collectors if the proposal were finalized. As a qualitative study, the survey's results are not necessarily representative of the debt collection industry as a whole, but they provide a broad understanding of how a range of different types of debt collectors operate.

The Operations Study focused on understanding how debt collection firms obtain information about delinquent consumer accounts and attempt to collect on those accounts.[46] Between July and September 2015, the Bureau sent a written survey to debt collection firms. The survey focused on current practices and included questions about employees, types of debt collected, clients, vendors, software, policies and procedures for consumer interaction, disputes, furnishing data to CRAs, litigation, and compliance. Between August and October 2015, the Bureau conducted telephone interviews with a subset of survey respondents. The interviews included several specific questions about the types of voicemails debt collectors leave and what share of lawsuits filed against consumers end with entry of default judgment, as well as some open-ended questions about the costs associated with making changes to collection management systems to address changes in State regulations. From July to October 2015, the Bureau conducted telephone interviews with debt collection vendors. A particular focus of these interviews was collection management systems, including programming and consulting services provided to system users. The Bureau also asked vendors about print mail services, predictive dialers, voice analytics, payment processing, and data services.

Although the Bureau constructed the survey sample to ensure representation of debt collection firms of various sizes, the survey was not intended to be nationally representative. Nonetheless, the survey findings generally have informed the Bureau's understanding of the operations and operating costs of various types of debt collection firms. Part VI discusses the Bureau's findings from the study in greater detail.

D. Survey of Consumer Experiences With Debt Collection

The Bureau conducted a survey of consumers' experiences with debt collection, approved under OMB control number 3170–0047, Debt Collection Survey from the Consumer Credit Panel, and published a report of the findings in January 2017 (CFPB Debt Collection Consumer Survey or Consumer Survey).[47] Distributed to consumers in December 2014, the survey asked consumers about their experiences with creditors and debt collectors over the prior year, including disputes and lawsuits, and how they prefer to communicate with a creditor or debt collector. The survey also asked for information on each consumer's demographic characteristics, general financial situation, and credit-market experiences. The survey sample was selected from the Bureau's Consumer Credit Panel, which consists of a nationally representative, de-identified set of credit records maintained by one of the three nationwide CRAs, and responses were weighted to provide nationally representative results. The Consumer Survey, which included survey participants' self-reported responses, provided a more comprehensive picture of consumers' experiences and preferences related to debt collection than was previously available.[48] The Bureau considered survey responses when developing the proposal.

The Consumer Survey describes in detail several key findings relating to the prevalence of debt collection, the extent to which consumers dispute debts, and the extent to which creditors or debt collectors pursue the collection of debts through lawsuits. About one-third of consumers with a credit file at one of the three nationwide CRAs reported being contacted by a creditor or debt collector about a debt in the prior year, and most of those consumers reported being contacted about two or more debts.[49] More than one-half of the consumers who had been contacted about a debt in collection indicated that at least one of the debts about which they had been contacted was not theirs or was for the wrong amount. Roughly one-quarter of the consumers who had been contacted about a debt in collection reported having disputed a debt with their creditor or debt collector in the past year.[50] About one-in-seven consumers (about 15 percent) who had been contacted about a debt in collection reported having been sued by a creditor or debt collector in the preceding year.[51]

The Consumer Survey also describes in detail several key findings related to the frequency with which consumers are contacted about debts in collection, how often consumers ask debt collectors to stop contacting them, how consumers prefer to be contacted by debt collectors, and the frequency with which consumers report negative experiences with debt collectors. More than one-third of consumers (37 percent) contacted about a debt in collection indicated that the creditor or debt collector that most recently had contacted them tried to reach them at least four times per week. Seventeen percent reported that the creditor or debt collector tried to reach them at least eight times per week. Close to two-thirds of consumers (63 percent) said

[43] 44 U.S.C. 3501 *et seq.*

[44] *See* Agency Information Collection Activities: Submission for OMB Review; Comment Request, 84 FR 1430 (Feb. 4, 2019).

[45] *See generally* Bureau of Consumer Fin. Prot., *Study of Third-Party Debt Collection Operations* (July 2016), *https://www.consumerfinance.gov/documents/755/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf* (hereinafter CFPB Debt Collection Operations Study).

[46] Most respondents collected debt on behalf of clients, rather than buying debt and collecting on their own behalf. Respondents that bought some debt reported that the majority of accounts they collected were for clients. As a result, the Operations Study did not provide distinct information on debt buyers and their operations as compared to third-party debt collectors.

[47] *See generally* CFPB Debt Collection Consumer Survey, *supra* note 18.

[48] *Id.* at 4.

[49] *Id.* at 13.

[50] *Id.* at 24–25.

[51] *Id.* at 27.

they were contacted too often by the most recent creditor or debt collector.[52]

Consumers contacted at the same frequency by creditors and debt collectors were more likely to characterize contact by a debt collector as occurring ''too often'' than when a creditor engaged in the same frequency of contact. In addition, 42 percent of consumers who reported they had been contacted about a debt in collection said they had asked at least one creditor or debt collector to stop contacting them in the prior year, but only one in four consumers who made this request reported that the contact stopped. Consumers contacted by debt collectors were more likely than those contacted by creditors to report negative experiences, such as being treated impolitely or being threatened.[53]

Almost one-half of the consumers (including those who did not report having been contacted by a creditor or debt collector about a debt in collection in the prior year) said they would most prefer debt collectors to contact them by letter. When asked the way they would least like debt collectors to contact them, consumers most commonly indicated in-person contacts (20 percent of consumers). Nearly two-thirds of consumers said it was ''very important'' that others not see or hear a message from a creditor or debt collector. At the same time, most consumers also preferred that a creditor or debt collector include their name and the purpose of the call (*i.e.,* debt collection) in a voicemail or answering-machine message.[54]

E. Small Business Review Panel

In August 2016, the Bureau convened a Small Business Review Panel (Small Business Review Panel or Panel) with the Chief Counsel for Advocacy of the Small Business Administration (SBA) and the Administrator of the Office of Information and Regulatory Affairs with the Office of Management and Budget (OMB).[55] As part of this process, the Bureau prepared an outline of proposals under consideration and the alternatives considered (Small Business Review Panel Outline or Outline),[56] which the Bureau posted on its website for review by the small entity representatives participating in the Panel process and by the general public.

The Panel participated in initial teleconferences with small groups of the small entity representatives to introduce the Outline and supporting materials and to obtain feedback. The Panel then conducted a full-day outreach meeting with the small entity representatives in August 2016 in Washington, DC. The Panel gathered information from the small entity representatives and made findings and recommendations regarding the potential compliance costs and other impacts of the proposals under consideration on those entities. Those findings and recommendations are set forth in the Small Business Review Panel Report, which is part of the administrative record in this rulemaking and is available to the public.[57] The Bureau has considered these findings and recommendations in preparing this proposal and addresses many of them in greater detail in part V.[58]

IV. Legal Authority

The Bureau issues this proposal pursuant to its authority under the FDCPA and the Dodd-Frank Act. As amended by the Dodd-Frank Act, FDCPA section 814(d) provides that the Bureau ''may prescribe rules with respect to the collection of debts by debt collectors,'' as defined in the FDCPA.[59] Section 1022(a) of the Dodd-Frank Act provides that ''[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.'' [60] Section 1022(b)(1) of the Dodd-Frank Act provides that the Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.[61] ''Federal consumer financial law'' includes title X of the Dodd-Frank Act and the FDCPA.[62]

These and other authorities are discussed in greater detail in parts IV.A through E below. Part IV.A discusses how the Bureau proposes to interpret its authority under sections 806 through 808 of the FDCPA. Parts IV.B through E discuss the Bureau's relevant authorities under the Dodd-Frank Act and the Electronic Signatures in Global and National Commerce Act (E–SIGN Act).

A. FDCPA Sections 806 Through 808

As discussed in part V, the Bureau proposes several provisions, in whole or in part, pursuant to its authority to interpret FDCPA sections 806, 807, and 808, which set forth general prohibitions on, and requirements relating to, debt collectors' conduct and are accompanied by non-exhaustive lists of examples of unlawful conduct. This section provides an overview of how the Bureau proposes to interpret FDCPA sections 806 through 808.

FDCPA section 806 generally prohibits a debt collector from ''engag[ing] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.'' [63] Then, ''[w]ithout limiting the general application of the foregoing,'' it lists six examples of conduct that violate that section.[64] Similarly, FDCPA section 807 generally prohibits a debt collector from ''us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt.'' [65] Then,

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[52] *Id.* at 30–31. As discussed further in the Consumer Survey, consumers' estimates of the frequency of contacts may be subject to uncertainty because the survey does not purport to distinguish in its questions or analysis between various factual scenarios.

[53] *Id.* at 34–35, 45–46.

[54] *Id.* at 36–38.

[55] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as amended by section 1100G(a) of the Dodd-Frank Act, requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a substantial economic impact on a significant number of small entities. *See* Public Law 104–121, tit. II, 110 Stat. 847, 857 (1996) (as amended by Pub. L. 110–28, section 8302 (2007)).

[56] Bureau of Consumer Fin. Prot., *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 2016), *https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf* (hereinafter Small Business Review Panel Outline). The Bureau also gathered feedback on the Small Business Review Panel Outline from other stakeholders, members of the public, and the Bureau's Consumer Advisory Board and Community Bank Advisory Council.

[57] Bureau of Consumer Fin. Prot., U.S. Small Bus. Admin., & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Debt Collector and Debt Buying Rulemaking* (Oct. 2016), *https://files.consumerfinance.gov/f/documents/cfpb_debt-collector-debt-buyer_SBREFA-report.pdf* (hereinafter Small Business Review Panel Report).

[58] Certain proposals under consideration in the Small Business Review Panel Outline and discussed in the Small Business Review Panel Report are not included in this proposed rule and therefore are not discussed in part V. For example, because this proposed rule would apply only to FDCPA-covered debt collectors, the Bureau does not include a discussion of proposals under consideration that would have imposed information transfer requirements on first-party creditors who generally are not FDCPA-covered debt collectors.

[59] 15 U.S.C. 1692*l*(d). As noted, the Bureau is the first Federal agency with authority to prescribe substantive debt collection rules under the FDCPA. Prior to the Dodd-Frank Act's grant of authority to the Bureau, the FTC published various materials providing guidance on the FDCPA. The FTC's materials have informed the Bureau's rulemaking and, if relevant to particular proposed provisions, are discussed in part V.

[60] 12 U.S.C. 5512(a).

[61] 12 U.S.C. 5512(b)(1).

[62] 12 U.S.C. 5481(12)(H), (14).

[63] 15 U.S.C. 1692d.

[64] *Id.* at 1692d(1)–(6).

[65] 15 U.S.C. 1692e.

''[w]ithout limiting the general application of the foregoing,'' section 807 lists 16 examples of conduct that violate that section.[66] Finally, FDCPA section 808 prohibits a debt collector from ''us[ing] unfair or unconscionable means to collect or attempt to collect any debt.'' [67] Then, ''[w]ithout limiting the general application of the foregoing,'' FDCPA section 808 lists eight examples of conduct that violate that section.[68] The Bureau interprets FDCPA sections 806 through 808 in light of: (1) The FDCPA's language and purpose; (2) the general types of conduct prohibited by those sections and, where relevant, the specific examples enumerated in those sections; and (3) judicial precedent.[69]

Interpreting General Provisions in Light of Specific Prohibitions or Requirements

By their plain terms, FDCPA sections 806 through 808 make clear that their examples of prohibited conduct do not ''limit[ ] the general application'' of those sections' general prohibitions. The FDCPA's legislative history is consistent with this understanding,[70] as are opinions by courts that have addressed this issue.[71] Accordingly, the Bureau may prohibit conduct that the specific examples in FDCPA sections 806 through 808 do not address if the conduct violates the general prohibitions.

The Bureau proposes to use the specific examples in FDCPA sections 806 through 808 to inform its interpretation of those sections' general prohibitions. Accordingly, the proposal would interpret the general provisions of FDCPA sections 806 through 808 to prohibit or require certain conduct that is similar to the types of conduct prohibited or required by the specific examples. For example, the proposal would interpret the general provisions in FDCPA sections 806 through 808 as protecting consumer privacy in debt collection in ways similar to the specific restrictions in: (1) FDCPA section 806(3), which prohibits, with certain exceptions, the publication of a list of consumers who allegedly refuse to pay debts; [72] (2) FDCPA section 808(7), which prohibits communicating with a consumer regarding a debt by postcard; and FDCPA section 808(8), which prohibits the use of certain language and symbols on envelopes.[73] The interpretative approach of looking to specific provisions to inform general provisions is consistent with judicial precedent indicating that the general prohibitions in the FDCPA should be interpreted ''in light of [their] associates.'' [74] For example, courts have held that violating a consumer's privacy interest through public exposure of a debt violates the FDCPA, noting that violating a consumer's privacy is a type of conduct prohibited by several specific examples.[75] In this way, the Bureau uses the specific examples in FDCPA sections 806 through 808 to inform its understanding of the general provisions, consistent with the statute's use of the phrase ''without limiting the general application of the foregoing'' to introduce the specific examples.[76]

Judicial Precedent

The Bureau interprets the general prohibitions in FDCPA sections 806 through 808 in light of the significant body of existing court decisions interpreting those provisions, which provides instructive examples of collection practices that are not addressed by the specific prohibitions in those sections but that nonetheless run afoul of the FDCPA's general prohibitions in sections 806 through 808.[77] For example, courts have held that a debt collector could violate FDCPA section 808 by using coercive tactics such as citing speculative legal consequences to pressure the consumer to engage with the debt collector.[78] Additionally, courts have held that a debt collector could violate FDCPA sections 806 through 808 by taking certain actions to collect a debt that a consumer does not actually owe or that is not actually delinquent.[79] Similarly, a debt collector could violate FDCPA section 807 by, for example, giving ''a false impression of the character of the debt,'' [80] such as by failing to disclose that an amount collected includes fees,[81] or by failing to disclose that the applicable statute of limitations has expired.[82]

Several courts have applied an objective standard of an ''unsophisticated'' or ''least sophisticated'' consumer to FDCPA sections 807 [83] and 808 [84] and an

[66] *Id.* at 1692e(1)–(16).

[67] 15 U.S.C. 1692f.

[68] *Id.* at 1692f(1)–(8).

[69] Where the Bureau proposes requirements pursuant only to its authority to implement and interpret sections 806 through 808 of the FDCPA, the Bureau does not take a position on whether such practices also would constitute an unfair, deceptive, or abusive act or practice under section 1031 of the Dodd-Frank Act. Where the Bureau proposes an intervention both pursuant to its authority to implement and interpret FDCPA sections 806 through 808 and pursuant to its authority to identify and prevent unfair acts or practices under Dodd-Frank Act section 1031, the section-by-section analysis explains why the Bureau proposes to identify the act or practice as unfair under the Dodd-Frank Act.

[70] *See, e.g.,* S. Rept. No. 95–382, 95th Cong., 1st Sess. 2, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (hereinafter S. Rept. No. 382) (''[T]his bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.''). Courts have also cited legislative history in noting that, ''in passing the FDCPA, Congress identified abusive collection attempts as primary motivations for the Act's passage.'' *Hart* v. *FCI Lender Servs, Inc.,* 797 F.3d 219, 226 (2d Cir. 2015).

[71] *See, e.g., Stratton* v. *Portfolio Recovery Assocs., LLC,* 770 F.3d 443, 450 (6th Cir. 2014) (''[T]he listed examples of illegal acts are just that—examples.'').

[72] 15 U.S.C. 1692d(3).

[73] 15 U.S.C. 1692f(7)–(8).

[74] *Currier* v. *First Resolution Inv. Corp.,* 762 F.3d 529, 534 (6th Cir. 2014) (citing *Limited, Inc.* v. *C.I.R.,* 286 F.3d 324, 332 (6th Cir. 2002)).

[75] *See id.* at 535.

[76] 15 U.S.C. 1692d–1692f.

[77] This interpretive approach is consistent with courts' reasoning that these general prohibitions should be interpreted in light of conduct that courts have already found violate them. *See, e.g., Todd* v. *Collecto, Inc.,* 731 F.3d 734, 739 (7th Cir. 2013). While judicial precedent informs the Bureau's interpretation of the general prohibitions in FDCPA sections 806 through 808, the Bureau does not propose to adopt specific judicial interpretations through its restatement of the general prohibitions except where noted in the proposal.

[78] *See, e.g., Hosseinzadeh* v. *M.R.S. Assocs., Inc.,* 387 F. Supp. 2d 1104, 1117 (C.D. Cal. 2005) (denying debt collector's motion for summary judgment on section 808 claim where debt collector used false name and implied that consumer ''would have legal problems'' if consumer did not return debt collector's telephone call).

[79] *See, e.g., Fox* v. *Citicorp Credit Servs., Inc.,* 15 F.3d 1507, 1517 (9th Cir. 1994) (reversing grant of summary judgment to debt collector in part because ''a jury could rationally find'' that filing writ of garnishment was unfair or unconscionable under section 808 when debt was not delinquent); *Ferrell* v. *Midland Funding, LLC,* No. 2:15–cv–00126–JHE, 2015 WL 2450615, at *3–4 (N.D. Ala. May 22, 2015) (denying debt collector's motion to dismiss section 806 claim where debt collector allegedly initiated collection lawsuit even though it knew plaintiff did not owe debt); *Pittman* v. *J.J. Mac Intyre Co. of Nev., Inc.,* 969 F. Supp. 609, 612–13 (D. Nev. 1997) (denying debt collector's motion to dismiss claims under sections 807 and 808 where debt collector allegedly attempted to collect fully satisfied debt).

[80] *Fields* v. *Wilber Law Firm, P.C.,* 383 F.3d 562, 565–66 (7th Cir. 2004) (reversing dismissal of plaintiff's claims brought under sections 807 and 808 because dunning letter that failed to communicate that total amount due included attorneys' fees ''could conceivably mislead an unsophisticated consumer'').

[81] *Id.*

[82] *See, e.g., Pantoja* v. *Portfolio Recovery Assocs.,* 852 F.3d 679, 686–87 (7th Cir. 2017).

[83] *See, e.g., Hartman* v. *Great Seneca Fin. Corp.,* 569 F.3d 606, 613 (6th Cir. 2009) (applying least sophisticated consumer standard to section 807 claim); *Bentley* v. *Great Lakes Collection Bureau,* 6 F.3d 60, 62 (2d. Cir. 1993) (same); *Swanson* v. *S. Or. Credit Serv., Inc.,* 869 F.2d 1222, 1227 (9th Cir. 1988) (same).

[84] *See, e.g., Crawford* v. *LVNV Funding, LLC,* 758 F.3d 1254, 1258 (11th Cir. 2014) (''[W]e have adopted a 'least-sophisticated consumer standard to evaluate whether a debt collector's conduct is 'deceptive,' 'misleading,' 'unconscionable,' or 'unfair' under the statute.''); *LeBlanc* v. *Unifund CCR Partners,* 601 F.3d 1185, 1200–01 (11th Cir. 2010) (applying least sophisticated consumer standard to section 808 claim); *Turner* v. *J.V.D.B. & Assocs., Inc.,* 330 F.3d 991, 997 (7th Cir. 2003)

objective, vulnerable consumer standard to FDCPA section 806.[85] In determining whether particular acts violate FDCPA sections 806 through 808, the Bureau interprets those sections to incorporate ''an objective standard'' that is designed to protect consumers who are ''of below-average sophistication or intelligence'' or who are ''especially vulnerable to fraudulent schemes.''[86]

Courts have reasoned, and the Bureau agrees, that ''[w]hether a consumer is more or less likely to be harassed, oppressed, or abused by certain debt collection practices does not relate solely to the consumer's relative sophistication'' and may be affected by other circumstances, such as the consumer's financial and legal resources.[87] Courts have further reasoned that section 807's prohibition on false, deceptive, or misleading representations incorporates an objective, ''unsophisticated'' consumer standard.[88] This standard ''protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness.''[89] The Bureau agrees with the reasoning of courts that have applied this standard or a ''least sophisticated consumer'' standard.[90] The Bureau proposes to use the term ''unsophisticated'' consumer to describe the standard it will apply in this proposal when assessing the effect of conduct on consumers.

FDCPA's Purposes

FDCPA section 802 establishes that the purpose of the statute is to eliminate abusive debt collection practices by debt collectors, to ensure that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.[91] In particular, FDCPA section 802 delineates certain specific harms that the general and specific prohibitions in sections 806 through 808 were designed to alleviate. Section 802 states: ''[T]he use of abusive, deceptive, and unfair debt collection practices by many debt collectors . . . contribute[s] to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.''[92]

B. Dodd-Frank Act Section 1031

Section 1031(b)

Section 1031(b) of the Dodd-Frank Act provides the Bureau with authority to prescribe rules to identify and prevent unfair, deceptive, or abusive acts or practices. Specifically, Dodd-Frank Act section 1031(b) authorizes the Bureau to prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[93] Section 1031(b) of the Dodd-Frank Act further provides that ''[r]ules under this section may include requirements for the purpose of preventing such acts or practices''[94] (sometimes referred to as prevention authority). The Bureau proposes certain provisions based on its authority under Dodd-Frank Act section 1031(b).

Section 1031(b) of the Dodd-Frank Act is similar to the FTC Act provisions relating to unfair and deceptive acts or practices.[95] Given these similarities, where the Bureau relies on Dodd-Frank Act section 1031(b) authority to support particular provisions, the Bureau is guided, in part, by case law and Federal agency rulemakings addressing unfair and deceptive acts or practices under the FTC Act. For example, case law establishes that, under the FTC Act, the FTC may impose requirements to prevent acts or practices that the FTC identifies as unfair or deceptive so long as the preventive requirements have a reasonable relation to the identified acts or practices.[96] Where the Bureau relies on Dodd Frank Act section 1031(b) prevention authority to support particular proposals, the Bureau explains how the preventive requirements have a reasonable relation to the identified unfair, deceptive, or abusive acts or practices.

Section 1031(c)

Section 1031(c)(1) of the Dodd-Frank Act provides that the Bureau shall have no authority under section 1031 to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau ''has a reasonable basis'' to conclude that: (A) The act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[97] Section 1031(c)(2) of the Dodd-Frank Act provides that, in determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Public policy considerations may not serve as a primary basis for such a determination.[98] The Bureau proposes certain interventions based in part on its authority under Dodd-Frank Act section 1031(c).

The unfairness standard under Dodd-Frank Act section 1031(c)—requiring primary consideration of the three elements (substantial injury, not reasonably avoidable by consumers, and

(applying unsophisticated consumer standard to section 808 claim). Circuit courts have also held, for example, that the least sophisticated consumer standard applies to a consumer's understanding of a validation notice required under FDCPA section 809 and threats to take legal action under FDCPA section 807(5). *See Swanson,* 869 F.2d at 1225–27; *Wilson,* 225 F.3d 350, 353 (3d Cir. 2000).

[85] For example, in *Jeter* v. *Credit Bureau, Inc.,* 760 F.2d 1168, 1179 (11th Cir. 1985), the court applied a standard analogous to the ''least sophisticated consumer'' to an FDCPA section 806 claim, holding that claims under section 806 ''should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse.''

[86] *See* Brief for the United States as Amicus Curiae Supporting Respondents, *Sheriff* v. *Gillie,* 136 S. Ct. 1594 (2016) (No. 15–338), 2016 WL 836755, at * 29 (quoting *Gammon* v. *GC Servs. Ltd. P'ship,* 27 F.3d 1254, 1257 (7th Cir. 1994) and *Clomon* v. *Jackson,* 988 F.2d 1314, 1319 (2d Cir. 1993)).

[87] *Jeter,* 760 F.2d at 1179 (''[R]ather, such susceptibility might be affected by other circumstances of the consumer or by the relationship between the consumer and the debt collection agency. For example, a very intelligent and sophisticated consumer might well be susceptible to harassment, oppression, or abuse because he is poor (*i.e.,* has limited access to the legal system), is on probation, or is otherwise at the mercy of a power relationship.'').

[88] *See* Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 86, at *10, 27–30.

[89] *Gammon,* 27 F.3d at 1257.

[90] *See, e.g., Rosenau* v. *Unifund Corp.,* 539 F.3d 218, 221 (3d Cir. 2008) (''We use the 'least sophisticated debtor' standard in order to effectuate the basic purpose of the FDCPA: To protect all consumers, the gullible as well as the shrewd'') (internal quotation marks and citation omitted); *Clomon,* 988 F.2d at 1319 (''To serve the purposes of the consumer-protection laws, courts have attempted to articulate a standard for evaluating deceptiveness that does not rely on assumptions about the 'average' or 'normal' consumer. This effort is grounded, quite sensibly, in the assumption that consumers of below-average sophistication or intelligence are especially vulnerable to fraudulent schemes. The least-sophisticated-consumer standard protects these consumers in a variety of ways.'').

[91] 15 U.S.C. 1692(e).

[92] 15 U.S.C. 1692(a).

[93] 12 U.S.C. 5531(b).

[94] *Id.*

[95] 15 U.S.C. 45.

[96] *See Jacob Siegel Co.* v. *Fed. Trade Comm'n,* 327 U.S. 608, 612–13 (1946) (''The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.'').

[97] 12 U.S.C. 5531(c)(1).

[98] 12 U.S.C. 5531(c)(2).

countervailing benefits to consumers or to competition) and permitting secondary consideration of public policy—is similar to the unfairness standard under the FTC Act.[99] Section 5(n) of the FTC Act was amended in 1994 to incorporate the principles set forth in the FTC's ''Commission Statement of Policy on the Scope of Unfairness Jurisdiction,'' [100] issued on December 17, 1980. The FTC Act unfairness standard, the FTC Policy Statement on Unfairness, rulemakings by the FTC and other Federal agencies,[101] and related cases [102] inform the scope and meaning of the Bureau's authority under Dodd-Frank Act section 1031(b) to issue rules that identify and prevent acts or practices that the Bureau determines are unfair pursuant to Dodd-Frank Act section 1031(c).

Substantial injury. The first element for a determination of unfairness under Dodd-Frank Act section 1031(c)(1) is that the act or practice causes or is likely to cause substantial injury to consumers. As discussed above, the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, rulemakings by the FTC and other Federal agencies, and related cases inform the meaning of the elements of the unfairness standard under Dodd-Frank Act section 1031(c)(1). The FTC noted in its Policy Statement on Unfairness that substantial injury ordinarily involves monetary harm.[103] The Policy Statement stated that trivial or speculative harms are not cognizable under the test for substantial injury.[104] The FTC also noted that an injury is ''sufficiently substantial'' if it consists of a small amount of harm to a large number of individuals or raises a significant risk of harm.[105] The FTC has found that substantial injury also may involve a large amount of harm experienced by a small number of individuals.[106] As described in the FTC Policy Statement, emotional effects from an act or practice might be a basis for a finding of unfairness in an extreme case in which tangible injury from the act or practice could be clearly demonstrated,[107] and the D.C. Circuit has upheld an FTC conclusion that the demonstrated effects on consumers from threats to seize household possessions were sufficient to form part of the substantial injury along with financial harm.[108] The Bureau has stated that emotional impact and other more subjective types of harm ''will not ordinarily amount to substantial injury'' but that, in certain circumstances, ''emotional impacts may amount to or contribute to substantial injury.'' [109]

Not reasonably avoidable. The second element for a determination of unfairness under Dodd-Frank Act section 1031(c)(1) is that the substantial injury is not reasonably avoidable by consumers. As discussed above, the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, rulemakings by the FTC and other Federal agencies, and related case law inform the meaning of the elements of the unfairness standard under Dodd-Frank Act section 1031(c)(1). The FTC stated that knowing the steps for avoiding injury is not enough for the injury to be reasonably avoidable; rather, the consumer must also understand and appreciate the necessity of taking those steps.[110] As the FTC explained in its Policy Statement on Unfairness, most unfairness matters are brought to ''halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.'' [111] The D.C. Circuit has noted that, if such behavior exists, there is a ''market failure'' and the agency ''may be required to take corrective action.'' [112] Assessing whether an injury is reasonably avoidable also requires taking into account the costs of making a choice other than the one made and the availability of alternatives in the marketplace.[113]

Countervailing benefits to consumers or competition. The third element for a determination of unfairness under Dodd-Frank Act section 1031(c)(1) is that the act or practice's countervailing benefits to consumers or to competition do not outweigh the substantial consumer injury. As discussed above, the FTC Act unfairness standard, the FTC Policy Statement on Unfairness, rulemakings by the FTC and other Federal agencies, and related cases inform the meaning of the elements of the unfairness standard under Dodd-Frank Act section 1031(c)(1). In applying the FTC Act's unfairness standard, the FTC has stated that it generally is important to consider both the costs of imposing a remedy and any benefits that consumers receive as a result of the act or practice. Authorities addressing the FTC Act's unfairness standard indicate that the countervailing benefits test does not require a precise quantitative analysis of benefits and costs, as such an analysis may be unnecessary or, in some cases,

[99] Section 5(n) of the FTC Act, as amended in 1994, provides that, ''The [FTC] shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the [FTC] may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.'' 15 U.S.C. 45(n).

[100] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science & Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.,* 104 F.T.C. 949, 1070–76 (1984), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-104/ftc_volume_decision_104__july_-_december_1984pages949_-_1088.pdf* (hereinafter FTC Policy Statement on Unfairness); *see also* S. Rept. 103–130, at 12–13 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1776 (legislative history to FTC Act amendments indicating congressional intent to codify the principles of the FTC Policy Statement on Unfairness).

[101] In addition to the FTC's rulemakings under unfairness authority, certain Federal prudential regulators have prescribed rules prohibiting unfair practices under section 18(f)(1) of the FTC Act and, in doing so, they applied the statutory elements consistent with the standards articulated by the FTC. *See* 74 FR 5498, 5502 (Jan. 29, 2009) (background discussion of legal authority for interagency Subprime Credit Card Practices rule). The Board, FDIC, and the OCC also previously issued guidance generally adopting these standards for purposes of enforcing the FTC Act's prohibition on unfair and deceptive acts or practices. *See id.*

[102] *See, e.g., Consumer Fin. Prot. Bureau* v. *NDG Fin. Corp.,* No. 15–cv–52110 CM, 2016 WL 7188792 (S.D.N.Y. Dec. 2, 2016); *Consumer Fin. Prot. Bureau* v. *Universal Debt & Payment Sols., LLC,* No. 1:15–CV–00–859 RWS, 2015 WL 11439178 (N.D. Ga. Sept. 1, 2015); *Consumer Fin. Prot. Bureau* v. *ITT Educ. Servs., Inc.,* 219 F. Supp. 3d 878 (S.D. Ind. 2015).

[103] *See* FTC Policy Statement on Unfairness, *supra* note 100, at 1073.

[104] *Id.*

[105] *Id.* at 1073 n.12.

[106] *Int'l Harvester Co.,* 104 F.T.C. 949, 1064 (1984).

[107] FTC Policy Statement on Unfairness, *supra* note 100, at 1073 n.16 (''In an extreme case, however, where tangible injury could be clearly demonstrated, emotional effects might possibly be considered as the basis for a finding of unfairness'').

[108] *See Am. Fin. Servs. Assoc.* v. *FTC,* 767 F.2d 957, 973–74 n.20 (D.C. Cir. 1985) (''the Commission found that 'the threat to seize household possessions causes 'great emotional suffering, humiliation, anxiety, and deep feelings of guilt, and this distress can lead to physical breakdowns or illness, disruption of the family, and undue strain on family relationships' '') (internal citations omitted).

[109] Bureau of Consumer Fin. Prot., *CFPB Supervision and Examination Process,* at UDAAP 2 (Apr. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.*

[110] *See Int'l Harvester,* 104 F.T.C. at 1066.

[111] FTC Policy Statement on Unfairness, *supra* note 100, at 1074.

[112] *Am. Fin. Servs. Assoc.,* 767 F.2d at 976.

[113] *See* FTC Policy Statement on Unfairness, *supra* note 100, at 1074 n.19 (''In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue.''); *Am. Fin. Servs. Assoc.,* 767 F.2d at 976–77 (reasoning that, because of factors such as substantial similarity of contracts offered by creditors, ''consumers have little ability or incentive to shop for a better contract'').

impossible; rather, the agency is expected to gather and consider reasonably available evidence.[114]

Public policy. As noted above, Dodd-Frank Act section 1031(c)(2) provides that, in determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Public policy considerations, however, may not serve as a primary basis for such a determination.[115]

C. Dodd-Frank Act Section 1032

The Bureau proposes certain provisions based in part on its authority under Dodd-Frank Act section 1032. Dodd-Frank Act section 1032(a) provides that the Bureau may prescribe rules to ensure that the features of any consumer financial product or service, ''both initially and over the term of the product or service,'' are ''fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' [116] Under Dodd-Frank Act section 1032(a), the Bureau is empowered to prescribe rules regarding the disclosure of the ''features'' of consumer financial products and services generally. Accordingly, the Bureau may prescribe rules containing disclosure requirements even if other Federal consumer financial laws do not specifically require disclosure of such features.

Dodd-Frank Act section 1032(b)(1) provides that ''any final rule prescribed by the Bureau under this section requiring disclosures may include a model form that may be used at the option of the covered person for provision of the required disclosures.'' [117] Dodd-Frank Act section 1032(b)(2) provides that such a model form ''shall contain a clear and conspicuous disclosure that at a minimum—(A) uses plain language comprehensible to consumers; (B) contains a clear format and design, such as an easily readable type font; and (C) succinctly explains the information that must be communicated to the consumer.'' [118] Dodd-Frank Act section 1032(b)(3) provides that any such model form ''shall be validated through consumer testing.''; [119]

Dodd-Frank Act section 1032(c) provides that, in prescribing rules pursuant to Dodd-Frank Act section 1032, the Bureau ''shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.'' [120] Dodd-Frank Act section 1032(d) provides that ''[a]ny covered person that uses a model form included with a rule issued under this section shall be deemed to be in compliance with the disclosure requirements of this section with respect to such model form.'' [121]

D. Other Authorities Under the Dodd-Frank Act

The Bureau proposes certain interventions based in part on its authority under Dodd-Frank Act sections 1022 and 1024. Section 1022(b)(1) of the Dodd-Frank Act provides that the Bureau's Director ''may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' [122] ''Federal consumer financial laws'' include the FDCPA and title X of the Dodd-Frank Act.[123]

Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under Dodd-Frank Act section 1022(b)(1).[124] See part VI for a discussion of the Bureau's standards for rulemaking under Dodd-Frank Act section 1022(b)(2).

Proposed § 1006.100 concerning the retention of records would be based in part on the Bureau's authority under Dodd-Frank Act section 1024(b)(7)(A) and (B) [125] as applied to debt collectors who are nondepository covered persons that the Bureau supervises under Dodd-Frank Act section 1024(a).[126] The section-by-section analysis of proposed § 1006.100 contains an additional description of the authorities on which the Bureau relies for proposed § 1006.100.

E. The E-SIGN Act

The E-SIGN Act provides standards for determining if delivery of a disclosure by electronic record satisfies a requirement in a statute, regulation, or other rule of law that the disclosure be provided or made available to a consumer in writing. The E-SIGN Act sets forth criteria under which Federal regulatory agencies may exempt a specified category or type of record from the consent requirements for electronic disclosures in the E-SIGN Act.[127] For the reasons set forth in part V, proposed § 1006.42(c) and (d) would exempt electronic delivery of certain required notices from the consent requirements of the E-SIGN Act. Pursuant to E-SIGN Act section 104(b)(1), which permits the Bureau to interpret the E-SIGN Act through the issuance of regulations, proposed comments 6(c)(1)–1 and –2 provide an interpretation of the E-SIGN Act as applied to a debt collector responding to a consumer's notification that the consumer refuses to pay the debt or wants the debt collector to cease communication; proposed comments 38–2 and –3 provide an interpretation of the E-SIGN Act as applied to a debt collector responding to a consumer dispute or request for original-creditor information; and proposed § 1006.42(b)(1) and proposed comment 42(b)(1)–1 provide an interpretation of the E-SIGN Act as applied to certain disclosures that the regulation would require debt collectors to provide.

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[114] *Pa. Funeral Dirs. Ass'n* v. *FTC,* 41 F.3d 81, 91 (3d Cir. 1994) (upholding FTC's amendments to the Funeral Industry Practices Rule and noting that ''much of a cost-benefit analysis requires predictions and speculation''); *Int'l Harvester,* 104 F.T.C. at 1065 n.59 (''In making these calculations we do not strive for an unrealistic degree of precision. . . . We assess the matter in a more general way, giving consumers the benefit of the doubt in close issues. . . . What is important . . . is that we retain an overall sense of the relationship between costs and benefits. We would not want to impose compliance costs of millions of dollars in order to prevent a bruised elbow.''); *see also* S. Rept. 103–130, at 13 (1994) (noting that, ''[i]n determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances, such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.'').

[115] 12 U.S.C. 5531(c)(2).

[116] 12 U.S.C. 5532(a).

[117] 12 U.S.C. 5532(b)(1).

[118] 12 U.S.C. 5532(b)(2).

[119] 12 U.S.C. 5532(b)(3).

[120] 12 U.S.C. 5532(c).

[121] 12 U.S.C. 5532(d).

[122] 12 U.S.C. 5512(b)(1).

[123] 12 U.S.C. 5481(14).

[124] 12 U.S.C. 5512(b)(2).

[125] Dodd-Frank Act section 1024(b)(7)(A) authorizes the Bureau to prescribe rules to facilitate supervision of persons identified as larger participants of a market for a consumer financial product or service as defined by rule in accordance with section 1024(a)(1)(B) of the Dodd-Frank Act, and Dodd-Frank Act section 1024(b)(7)(B) authorizes the Bureau to require a person described in Dodd-Frank Act section 1024(a)(1) to retain records for the purpose of facilitating supervision of such persons and assessing and detecting risks to consumers.

[126] 12 U.S.C. 5514(b)(7)(A)–(B).

[127] 15 U.S.C. 7004(d)(1).

V. Section-by-Section Analysis

Subpart A—General

Section 1006.1 Authority, Purpose, and Coverage

1(a) Authority

FDCPA section 817 provides that the Bureau shall by regulation exempt from the requirements of the FDCPA any class of debt collection practices within any State if the Bureau determines that certain conditions have been met.[128] Before the Bureau's creation, FDCPA section 817 provided the same authority to the FTC, and the FTC issued a rule to describe procedures for a State to apply for such an exemption.[129] After the Dodd-Frank Act granted the Bureau FDCPA rulewriting authority, the Bureau restated the FTC's existing rule regarding State exemptions without substantive change as the Bureau's Regulation F, 12 CFR part 1006.[130] Existing § 1006.1(a) thus states that the purpose of Regulation F is to establish procedures and criteria for States to apply to the Bureau for an exemption as provided in FDCPA section 817.

Consistent with the Bureau's proposal to revise part 1006 to regulate the debt collection activities of FDCPA-covered debt collectors, the Bureau proposes to revise existing § 1006.1(a) to set forth the Bureau's authority to issue such rules. Proposed § 1006.1(a) provides that part 1006 is known as Regulation F and is issued by the Bureau pursuant to sections 814(d) and 817 of the FDCPA,[131] title X of the Dodd-Frank Act,[132] and section 104(b)(1) and (d)(1) of the E–SIGN Act.[133] The Bureau proposes to move the remainder of existing § 1006.1(a), regarding State-law exemptions from the FDCPA, to paragraph I(a) of appendix A of the regulation.[134]

1(b) Purpose

Existing § 1006.1(b) defines terms relevant to the procedures and criteria for States to apply to the Bureau for an exemption as provided in FDCPA section 817. Consistent with the Bureau's proposal to revise part 1006 to regulate the debt collection activities of FDCPA-covered debt collectors, the Bureau proposes to revise § 1006.1(b) to identify the purposes of part 1006. The Bureau proposes to move the definitions in existing § 1006.1(b) to paragraph 1(b) of appendix A of the regulation.[135]

Consistent with FDCPA section 802, proposed § 1006.1(b) explains that part 1006 carries out the purposes of the FDCPA, which include eliminating abusive debt collection practices by debt collectors, ensuring that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses. Consistent with Dodd-Frank Act section 1032, proposed § 1006.1(b) further explains that part 1006 also prescribes requirements to ensure that certain features of debt collection are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with debt collection, in light of the facts and circumstances. Finally, consistent with Dodd-Frank Act sections 1022(b)(1) and 1024(b)(7), proposed § 1006.1(b) explains that part 1006 sets forth record retention requirements to enable the Bureau to administer and carry out the purposes of the FDCPA and the Dodd-Frank Act and to prevent evasions thereof, and to facilitate supervision of debt collectors and the assessment and detection of risks to consumers.

1(c) Coverage

The Bureau proposes to add § 1006.1(c) to address coverage under the proposed rule, which, with the exception of proposed § 1006.108 and appendix A, would apply to FDCPA-covered debt collectors.[136] Proposed § 1006.1(c)(1) thus provides that, except as provided in § 1006.108 and appendix A regarding applications for State exemptions from the FDCPA, proposed part 1006 applies to debt collectors as defined in proposed § 1006.2(i), *i.e.,* debt collectors covered by the FDCPA.[137]

Proposed § 1006.1(c)(1) also would implement FDCPA section 814(d), which provides, in part, that the Bureau may not prescribe rules under the FDCPA with respect to motor vehicle dealers as described in section 1029(a) of the Dodd-Frank Act.[138] Proposed § 1006.1(c)(1) would clarify that Regulation F would not apply to a person excluded from coverage by section 1029(a) of the Dodd-Frank Act.[139]

The Bureau proposes certain provisions of the proposed rule only under sections 1031 or 1032 of the Dodd-Frank Act. Dodd-Frank Act section 1031 grants the Bureau authority to write regulations applicable to covered persons and service providers to identify and prevent unfair, deceptive, or abusive acts or practices in connection with a transaction with a consumer for, or the offering of, a consumer financial product or service.[140] Dodd-Frank Act section 1032 grants the Bureau authority to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers.[141] Under the Dodd-Frank Act, collecting a debt related to any consumer financial product or service generally is, itself, a consumer financial product or service.[142] Of primary relevance here, a consumer financial product or service includes the extension of consumer credit.[143] Provisions proposed only under Dodd-Frank Act sections 1031 or 1032, if adopted, therefore would apply to FDCPA-covered debt collectors only to the extent that such debt collectors were collecting a debt related to an extension of consumer credit or another consumer financial product or service.[144] This would include, for example, FDCPA-covered debt collectors collecting debts related to consumer mortgage loans or credit cards.

Proposed § 1006.1(c)(2) would clarify that certain provisions in proposed Regulation F apply to FDCPA-covered debt collectors only when they are collecting consumer financial product or service debt, as defined in § 1006.2(f).[145] Proposed § 1006.1(c)(2) specifies that these provisions are §§ 1006.14(b)(1)(ii), 1006.30(b)(1)(ii),

[128] 15 U.S.C. 1692o.

[129] *See* 16 CFR part 901.

[130] 76 FR 78121 (Dec. 16, 2011).

[131] 15 U.S.C. 1692*l*(d), 1692o.

[132] 12 U.S.C. 5481 *et seq.*

[133] 15 U.S.C. 7004(b)(1), 7004(d)(1).

[134] See the section-by-section analysis of proposed § 1006.108 and appendix A.

[135] *See id.*

[136] Proposed § 1006.108 and appendix A would apply to States.

[137] Section 812 of the FDCPA addresses the furnishing of deceptive forms and applies to any person, not just to debt collectors. Proposed 1006.30(e) would prohibit FDCPA-covered debt collectors from furnishing deceptive forms. Other persons would continue to be prohibited from furnishing deceptive forms under FDCPA section 812.

[138] 12 U.S.C. 5519(a).

[139] This proposed exclusion would apply only to Regulation F. Any motor vehicle dealers who are FDCPA-covered debt collectors would still need to comply with the FDCPA.

[140] 12 U.S.C. 5531(b).

[141] 12 U.S.C. 5532.

[142] It is a financial product or service and is a consumer financial product or service if, for example, it is delivered offered, or provided in connection with a consumer financial product or service. *See* 12 U.S.C. 5481(5)(B), 5481(15)(A)(x).

[143] 12 U.S.C. 5481(15)(A)(i). The Dodd-Frank Act defines credit to mean the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase. 12 U.S.C. 5481(7).

[144] 12 U.S.C. 5481(5).

[145] See the section-by-section analysis of proposed § 1006.2(f).

and 1006.34(c)(2)(iv) and (3)(iv). The Bureau requests comment on all aspects of proposed § 1006.1(c), including on whether additional clarification would be helpful.

Section 1006.2 Definitions

FDCPA section 803 defines terms used throughout the statute.[146] Proposed § 1006.2 would repurpose existing § 1006.2 to implement and interpret FDCPA section 803 and define additional terms that would be used in the regulation.[147] The Bureau proposes to move existing § 1006.2, which describes how a State may apply for an exemption from the FDCPA, to paragraph II of appendix A of the regulation.[148]

Paragraphs (c), (g), and (*l*) of proposed § 1006.2 would implement the FDCPA section 803 definitions of Bureau, creditor, and State, respectively. These paragraphs generally restate the statute, with only minor wording and organizational changes for clarity, and thus are not addressed further in the section-by-section analysis below. Proposed § 1006.2(a) and (b), (d) through (f), and (h) through (k) would define other terms that would be used in the regulation, as described below. The Bureau proposes § 1006.2 to implement and interpret FDCPA section 803, pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. In addition to the specific comment requests noted below, the Bureau generally requests comment on whether additional clarification is needed for any of the proposed definitions and on whether additional definitions would be helpful. For example, the proposal uses the term ''day'' to refer to any day, including weekends and public holidays. The Bureau requests comment on whether adding a defined term such as ''calendar day'' and using it in the final rule would be helpful.

2(a) Act or FDCPA

Proposed § 1006.2(a) provides that the terms Act and FDCPA mean the Fair Debt Collection Practices Act.

2(b) Attempt To Communicate

Several of the proposed rule's requirements would apply not only to communications as defined in § 1006.2(d) but also to communication attempts. For example, proposed § 1006.6(b) and (c) would, among other things, prohibit a debt collector from communicating or attempting to communicate with a consumer at times or places that the debt collector knows or should know are inconvenient to the consumer or after a consumer notifies the debt collector in writing that the consumer wishes the debt collector to cease further communication with the consumer. In addition, proposed § 1006.22(f)(3) and (4) would generally prohibit a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is maintained by the consumer's employer or by a social media platform that is viewable by a person other than the consumer.

To facilitate compliance with the proposed provisions that apply to attempts to communicate, proposed § 1006.2(b) would define an attempt to communicate as any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person. Proposed § 1006.2(b) further states that an attempt to communicate includes providing a limited-content message, as defined in § 1006.2(j). The Bureau proposes this definition of attempt to communicate on the basis that any outreach by a debt collector to a consumer—whether by a telephone call, text message, email, or otherwise—is designed to bring about a communication either immediately (*e.g.,* a consumer answers a debt collector's telephone call and they engage in a conversation about the debt) or at a later point in time (*e.g.,* in response to a missed telephone call or a limited-content message from a debt collector, a consumer calls or texts the debt collector and they engage in a conversation about the debt).

As proposed, an attempt to communicate covers a broader range of activity than a communication. As discussed in the section-by-section analysis of proposed § 1006.2(d), the proposed rule would define a communication, consistent with FDCPA section 803(2), as the conveying of information regarding a debt directly or indirectly to any person through any medium. The proposed definition of communication further states that a debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message, as defined in proposed § 1006.2(j). The proposed definition of attempt to communicate, in contrast, does not require the conveying of information regarding a debt. As the examples in proposed comment 2(b)–1 illustrate, an attempt to communicate includes leaving a limited-content message for a consumer or placing a telephone call to a person, regardless of whether the debt collector speaks to any person or leaves any message at the dialed number. Proposed comment 2(b)–1 also would clarify that an act to initiate a communication or other contact with a person is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person.

Although the proposed definition of attempt to communicate covers a broader range of conduct than the proposed definition of communication, in many circumstances the same conduct may give rise to both an attempt to communicate and a communication. For example, a debt collector who places a telephone call to a consumer and speaks to the consumer about the debt has both attempted to communicate with the consumer (by initiating the call and speaking to the consumer) and communicated with the consumer (by conveying information about the debt). Sometimes, however, an attempt to communicate may not give rise to a communication. For example, a debt collector who places an unanswered telephone call to a consumer and chooses not to leave a message has attempted to communicate with the consumer but has not communicated with the consumer. The Bureau requests comment on proposed § 1006.2(b) and on proposed comment 2(b)–1.

2(d) Communicate or Communication

FDCPA section 803(2) defines the term communication to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[149] Proposed § 1006.2(d) would implement and interpret this definition.

Proposed § 1006.2(d) first restates the statutory definition of communication, with only minor changes for clarity. Proposed § 1006.2(d) also would interpret FDCPA section 803(2) to provide that a debt collector does not convey information regarding a debt directly or indirectly to any person—and therefore does not communicate with any person—if the debt collector provides only a limited-content message, as defined in proposed § 1006.2(j). The section-by-section analysis of proposed § 1006.2(j)

[146] 15 U.S.C. 1692a.

[147] FDCPA section 803(7) defines the term ''location information.'' 15 U.S.C. 1692a(7). The Bureau proposes to define that term in § 1006.10, rather than in § 1006.2. See the section-by-section analysis of proposed § 1006.10(a).

[148] See the section-by-section analysis of proposed § 1006.108 and appendix A.

[149] 15 U.S.C. 1692a(2).

regarding limited-content messages explains and requests comment both on the proposed content of limited-content messages and on the Bureau's proposal to interpret the term communication in § 1006.2(d) as excluding such messages.

Proposed comment 2(d)–1 notes that a communication can occur through ''any medium'' and explains that ''any medium'' includes any oral, written, electronic, or other medium. The proposed comment states that a communication may occur, for example, in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media. The Bureau proposes comment 2(d)–1 in part to clarify that debt collectors may communicate with consumers through newer communication media, such as electronic media. The Bureau elsewhere proposes provisions to clarify how debt collectors may use those media to communicate with consumers. The Bureau requests comment on proposed § 1006.2(d) and on proposed comment 2(d)–1 and on whether additional clarification about the definition of communication would be useful.

2(e) Consumer

FDCPA section 803(3) defines a consumer as any natural person obligated or allegedly obligated to pay any debt.[150] Proposed § 1006.2(e) would implement this definition, interpret it to include a deceased natural person who is obligated or allegedly obligated to pay a debt, and cross-reference the special definition of consumer for certain communications in connection with the collection of a debt set forth in proposed § 1006.6(a).

As summarized in part I.B, the Bureau proposes to address several consumer protection concerns and ambiguities in statutory language related to the collection of debts owed by deceased consumers, also known as decedent debt. One such issue is that the FDCPA does not specify whether a consumer, as defined in section 803(3), includes a deceased consumer (or whether a natural person, as that term is used in section 803(3), includes a deceased natural person). Because the definition of consumer in FDCPA section 803(3) is silent with respect to deceased consumers, debt collectors may be uncertain, when collecting a deceased consumer's debts, how to comply with FDCPA provisions that refer to a debt collector's obligations to a consumer.

For example, certain important FDCPA disclosure requirements, such as a debt collector's obligation to provide a validation notice and to respond to disputes and requests for original-creditor information, refer only to a debt collector's obligations to consumers.[151] In the absence of guidance, debt collectors may be uncertain who, if anyone, should receive the validation notice and have the right to dispute the debt if the consumer obligated or allegedly obligated to pay the debt is deceased. Without a validation notice and an opportunity to dispute the debt, individuals trying to resolve debts in a deceased consumer's estate may experience difficulty because they lack information needed to determine whether they are being asked to pay the right debt, in the right amount, to the right debt collector, and to assert dispute rights. To address that concern, the Bureau proposes to clarify in the commentary to §§ 1006.34(a)(1) and 1006.38 that a person who is authorized to act on behalf of the deceased consumer's estate, such as the executor, administrator, or personal representative, operates as the consumer for purposes of proposed §§ 1006.34(a)(1) and 1006.38.[152]

Consistent with those proposed clarifications, the Bureau proposes in § 1006.2(e) to interpret the definition of consumer in FDCPA section 803(3) to mean any natural person, whether living or deceased, who is obligated or allegedly obligated to pay any debt. The proposed interpretation should clarify the meaning of the term consumer in the decedent debt context and appears to be consistent with a modern trend in the law that favors recognizing, as a default, the continued existence of a natural person after death.[153] Further, the Bureau notes that debt collectors often collect or attempt to collect debts from deceased consumers (*i.e.,* from their estates), which presents many of the same consumer-protection concerns as collecting or attempting to collect debts from living consumers.

In addition to proposing to clarify the meaning of the term consumer in the decedent debt context, the Bureau proposes in § 1006.2(e) to cross-reference the special definition of consumer for certain communications in connection with the collection of a debt in proposed § 1006.6(a). As described in the section-by-section analysis of proposed § 1006.6, FDCPA section 805(d) identifies certain persons in addition to the section 803(3) consumer as persons with whom a debt collector may communicate in connection with the collection of any debt without violating FDCPA section 805(b)'s prohibition on third-party disclosures.[154] The Bureau proposes to implement FDCPA section 805(d) in § 1006.6(a) and to cross-reference the § 1006.6(a) definition in proposed § 1006.14(h). As discussed below, proposed § 1006.14(h) would prohibit a debt collector from communicating or attempting to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. Accordingly, proposed § 1006.2(e) provides that, for purposes of proposed §§ 1006.6 and 1006.14(h), the term consumer has the meaning given to it in proposed § 1006.6(a). For further discussion, see the section-by-section analysis of proposed § 1006.6(a). The Bureau requests comment on the definition of consumer in proposed § 1006.2(e), including on whether the definition should include deceased consumers.

2(f) Consumer Financial Product or Service Debt

As discussed in the section-by-section analysis of proposed § 1006.1(c), certain proposed provisions would apply to debt collectors only if they are collecting a debt related to a consumer

[150] 15 U.S.C. 1692a(3).

[151] *See* 15 U.S.C. 1692g(a)–(b).

[152] See proposed comments 34(a)(1)–1, 34(d)(1)(ii)–2, and 38–1.

[153] *See, e.g.,* Cal. Civ. Proc. Code sec. 377.20(a) (2018) (''Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.''). Federal law often provides an unclear answer about whether claims survive the death of a natural person. Rule 25(a) of the Federal Rules of Civil Procedure allows substitution ''[i]f a party dies and the claim is not extinguished,'' but Federal statutes often do not address whether claims extinguish upon the death of a plaintiff or defendant and, in these cases, Federal common law generally permits survival of claims where they are merely remedial in nature and not penal. *See Ex parte Schreiber,* 110 U.S. 76, 80 (1884). Most authority suggests that claims brought under other portions of the Consumer Credit Protection Act (CCPA), of which the FDCPA is subchapter V, likely are remedial rather than penal in nature. *See, e.g., Murphy* v. *Household Fin. Corp.,* 560 F.2d 206, 210 (6th Cir. 1977) (holding, in a widely adopted test, that double damages under Truth in Lending Act (TILA), subchapter I of the CCPA, are remedial rather than penal); *In re Wood,* 643 F.2d 188, 192 (5th Cir. 1980) (following *Murphy* to conclude that trustee of debtor's estate had standing to bring claims under TILA). On the other hand, some courts, for example, follow the tradition of the common law and treat a ''natural person'' as ceasing to exist at the point of death. *See, e.g., Williamson* v. *Treasurer,* 814 A.2d 1153, 1164 (N.J. Super. Ct. App. Div. 2003) (''We would not describe the body or remains of a deceased person as still a human being or a natural person.'' (interpreting the New Jersey Right to Know law and citing *Natural person,* Black's Law Dictionary (7th ed. 1999))). In light of the conflicting traditions and the FDCPA's silence, it appears appropriate to regard the statutory term ''consumer'' as ambiguous as to whether it includes or excludes a deceased consumer.

[154] 15 U.S.C. 1692c(d).

financial product or service, as that term is defined in section 1002(5) of the Dodd-Frank Act.[155] Debt related to a consumer financial product or service would include, for example, debts related to consumer mortgage loans or credit cards. For ease of reference, proposed § 1006.2(f) would define the term consumer financial product or service debt to mean a debt related to a consumer financial product or service, as consumer financial product or service is defined in section 1002(5) of the Dodd-Frank Act.

2(h) Debt

FDCPA section 803(5) defines the term debt for purposes of the FDCPA. Proposed § 1006.2(h) would implement FDCPA section 803(5) and generally restates the statute. Proposed § 1006.2(h) also would clarify that, for purposes of § 1006.2(f), the term debt means debt as that term is used in the Dodd-Frank Act. The Bureau proposes this clarification to ensure that, when determining whether a debt is a debt related to a consumer financial product or service for purposes of § 1006.2(f), debt collectors and other stakeholders refer to the Dodd-Frank Act rather than the FDCPA's definition of debt.

2(i) Debt Collector

FDCPA section 803(6) defines the term debt collector for purposes of the FDCPA. The introductory language of FDCPA section 803(6) generally provides that a debt collector is any person: (1) Who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts (*i.e.,* the ''principal purpose'' prong), or (2) who regularly collects, or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another (*i.e.,* the ''regularly collects'' prong).[156] FDCPA section 803(6) also sets forth several exclusions from the general definition.[157] Proposed § 1006.2(i) would implement FDCPA section 803(6)'s definition of debt collector and generally restates the statute, with only minor wording and organizational changes for clarity [158] and to specify that the term excludes private entities that operate certain bad check enforcement programs that comply with FDCPA section 818.[159]

The Supreme Court recently has interpreted FDCPA section 803(6). In *Henson* v. *Santander Consumer USA Inc.,* the Court held that a company may collect defaulted debts that it has purchased from another without being an FDCPA-covered debt collector.[160] In so holding, the Court decided only whether, by using its own name to collect debts that it had purchased, Santander met the ''regularly collects'' prong of the introductory language in FDCPA section 803(6). The Court expressly declined to address two other ways that a debt buyer like Santander might qualify as a debt collector under FDCPA section 803(6): (1) By meeting the ''regularly collects'' prong by regularly collecting or attempting to collect debts owned by others, in addition to collecting debts that it purchased and owned; or (2) by meeting the ''principal purpose'' prong of the definition.[161] The Court held that Santander was not a debt collector within the meaning of the ''regularly collects'' prong because Santander was collecting debts that it purchased and owned, not collecting debts owed to another.[162]

Proposed § 1006.2(i) generally would restate FDCPA section 803(6)'s definition of debt collector. Consistent with the Court's holding in *Henson,* the proposed definition thus could include a debt buyer collecting debts that it purchased and owned, if the debt buyer either met the ''principal purpose'' prong of the definition or regularly collected or attempted to collect debts owned by others, in addition to collecting debts that it purchased and owned.[163]

2(j) Limited-Content Message

FDCPA section 803(2) defines the term communication to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[164] As discussed, proposed § 1006.2(d) would implement and interpret that definition, including by specifying that a debt collector does not engage in an FDCPA communication if the debt collector provides only a limited-content message.[165] Proposed § 1006.2(j) would further interpret FDCPA section 803(2) by defining the content that a limited-content message would be required and permitted to include. For the reasons discussed below, under the Bureau's interpretation of the term communication, a limited-content message would not convey information about a debt directly or indirectly to any person, and, as a result, a debt collector could provide such a message for a consumer without communicating with any person for the purposes of the FDCPA or Regulation F.

The definition of communication is central to the FDCPA's protections, many of which regulate a debt collector's communications with a consumer or other person. For example, FDCPA section 805 [166] restricts when and where a debt collector may communicate with a consumer, FDCPA sections 806 through 808 [167] contain requirements concerning the form and content of a debt collector's communications with a consumer or other person, and FDCPA section 804 [168] imposes requirements on a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer.

Uncertainty about what constitutes a communication, however, has led to questions about how debt collectors can leave voicemails or other messages for consumers while complying with certain FDCPA provisions. Most significantly, if a voicemail or other message is a communication with a consumer, FDCPA section 807(11) requires that the debt collector identify itself as a debt collector or inform the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.[169] A debt collector who leaves a message with such disclosures, however, risks violating FDCPA section 805(b)'s prohibition against revealing debts to third parties if the disclosures are seen or heard by a third party.[170] Uncertainty about what constitutes a communication may result in debt collectors repeatedly calling consumers

[155] 12 U.S.C. 5481(5). See the section-by-section analysis of proposed § 1006.1(c).

[156] 15 U.S.C. 1692a(6).

[157] *Id.*

[158] For example, to avoid obsolete language, proposed § 1006.2(i) uses the term ''mail'' instead of ''the mails.''

[159] 15 U.S.C. 1692p.

[160] *Henson* v. *Santander Consumer USA, Inc.,* 137 S. Ct. 1718 (2017). In addition to *Henson,* the Supreme Court also recently interpreted FDCPA section 803(6) to hold that a business engaged in no more than nonjudicial foreclosure proceedings is not an FDCPA-covered debt collector, except for the limited purpose of FDCPA section 808(6). *See Obduskey* v. *McCarthy & Holthus LLP,* 139 S. Ct. 1029 (2019).

[161] *Henson,* 137 S. Ct. at 1721. The Court had not identified these questions as being presented when it granted certiorari. *Id.*

[162] *Id.* at 1721–22.

[163] *See, e.g., Barbato* v. *Greystone Alliance, LLC,* 916 F.3d 260 (3d Cir. 2019) (holding that a debt buyer whose principal purpose was debt collection was an FDCPA-covered debt collector even though the debt buyer outsourced its collection activities to third parties).

[164] 15 U.S.C. 1692a(2).

[165] See the section-by-section analysis of proposed § 1006.2(d).

[166] 15 U.S.C. 1692c.

[167] 15 U.S.C. 1692d–1692f.

[168] 15 U.S.C. 1692b.

[169] 15 U.S.C. 1692e(11). See also the section-by-section analysis of proposed § 1006.18(e).

[170] 15 U.S.C. 1692c(b). See also the section-by-section analysis of proposed § 1006.6(d).

and hanging up rather than risking liability by leaving messages.

Courts interpreting the FDCPA's definition of communication and the intersection of FDCPA sections 805(b) and 807(11) have reached conflicting results. Some courts hold that a message asking for a return call from a consumer is a communication and that a debt collector who leaves such a message violates FDCPA section 805(b)'s prohibition on communicating with third parties if the message is heard by a person other than the consumer.[171] These courts also hold that, because the message is a communication with the consumer, it must include a statement pursuant to FDCPA section 807(11) that the caller is attempting to collect a debt, which further increases the likelihood that a third party hearing the message would know that the message relates to debt collection.[172] Conversely, other courts hold that a message limited to certain content—such as the debt collector's name, a statement that the caller is a debt collector, and a call-back number—is not a communication and thus does not, itself, constitute a prohibited third-party disclosure under FDCPA section 805(b) or require an FDCPA section 807(11) disclosure.[173]

Many debt collectors state that they err on the side of caution and make repeated telephone calls instead of leaving messages on a consumer's voicemail or with a third party who answers a consumer's telephone, or sending text messages.[174] Such repeated telephone calls may frustrate many consumers. Indeed, consumers often complain to the Bureau about the number of collection calls they receive and, to a lesser degree, about debt collectors' reluctance to leave voicemails.[175] In comments to the Bureau's ANPRM and in feedback during the SBREFA process, many debt collectors stated that they would place fewer telephone calls if they were confident that leaving voicemails or other messages for consumers would not expose them to risk of liability under the FDCPA.[176] The FTC and the U.S. Government Accountability Office also have previously noted the need to clarify the law regarding debt collectors' ability to leave voicemails for consumers.[177]

To address uncertainty about what constitutes an FDCPA communication and to reduce the need for debt collectors to rely on repeated telephone calls without leaving messages to establish contact with consumers, the Bureau proposes § 1006.2(j) to interpret FDCPA section 803(2) and define a message whose content would not ''convey[ ] information regarding a debt directly or indirectly to any person.'' Specifically, proposed § 1006.2(j) would provide that a limited-content message means a message for a consumer that includes all of the content described in § 1006.2(j)(1), and that may include any of the content described in § 1006.2(j)(2), but does not include other content. As discussed in the section-by-section analysis of proposed § 1006.2(b) and (d), a limited-content message would not be a communication, as defined in § 1006.2(d), but would be an attempt to communicate, as defined in § 1006.2(b).

Under the proposal, a debt collector who leaves a limited-content message for a consumer would not have communicated with the consumer or any other person through that message. In turn, because FDCPA sections 805(b) and 807(11) both apply only to communications as defined by the FDCPA, the requirements described in those sections would not apply to the limited-content message. Accordingly, a limited-content message would not be required to include a disclosure pursuant to FDCPA section 807(11) (as implemented by proposed § 1006.18(e)), and a debt collector would not risk violating FDCPA section 805(b) (as

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[171] *See, e.g., Cordes* v. *Frederick J. Hanna & Assocs., P.C.,* 789 F. Supp. 2d 1173, 1177 (D. Minn. 2011) (holding that debt collector violated FDCPA section 805(b) by leaving voicemail messages that disclosed that the caller was a debt collector); *Marisco* v. *NCO Fin. Sys., Inc.,* 946 F. Supp. 2d 287, 289, 291–96 (E.D.N.Y. 2013) (holding that consumer stated a claim for a violation of FDCPA 805(b) where debt collector's voicemail message was overheard by a third party and stated, in part, ''This is an important message from NCO Financial Systems, Inc. The law requires that we notify that this is a debt collection company. This is an attempt to collect a debt and any information obtained will be used for that purpose. This is an attempt to collect a debt.''); *Fed. Trade Comm'n* v. *Check Enforcement,* No. CIV.A. 03–2115 (JWB), 2005 WL 1677480, at *8 (D.N.J. July 18, 2005) (''[T]he record indicates that defendants left messages on home answering machines, which were overheard by family members and other third parties, to obtain payments from alleged indebted consumers. Thus, defendants have . . . engaged in prohibited communications with third parties in violation of Section 805 of the FDCPA.''), *aff'd sub nom. Fed. Trade Comm'n* v. *Check Investors, Inc.,* 502 F.3d 159 (3d Cir. 2007); *see also Foti* v. *NCO Fin. Sys., Inc.,* 424 F. Supp. 2d 643, 655–56 (S.D.N.Y. 2006) (''Defendant's voicemail message, while devoid of any specific information about any particular debt, clearly provided some information, even if indirectly, to the intended recipient of the message. Specifically, the message advised the debtor that the matter required immediate attention, and provided a specific number to call to discuss the matter. Given that the obvious purpose of the message was to provide the debtor with enough information to entice a return call, it is difficult to imagine how the voicemail message is not a communication under the FDCPA.'').

[172] *Foti,* 424 F. Supp. 2d at 657–58 (''[A] narrow reading of the term 'communication' to exclude instances such as the present case where no specific information about a debt is explicitly conveyed could create a significant loophole in the FDCPA, allowing debtors to circumvent the § 1692e(11) disclosure requirement, and other provisions of the FDCPA that have a threshold 'communication' requirement, merely by not conveying specific information about the debt . . . . Such a reading is inconsistent with Congress's intent to protect consumers from 'serious and widespread' debt collection abuses.''); *Hosseinzadeh* v. *M.R.S. Assocs., Inc.,* 387 F. Supp. 2d 1104, 1116 (C.D. Cal. 2005) (''Because it appears that defendant's messages are 'communications' subjecting defendant to the provisions of § 1692e(11), it also appears that defendant has violated § 1692e(11) because the messages do not convey the information required by § 1692e(11), in particular, that the messages were from a debt collector.'').

[173] *See, e.g., Zortman* v. *J.C. Christensen & Assocs., Inc.,* 870 F. Supp. 2d 694, 701, 707–08 (D. Minn. 2012) (holding that debt collector did not violate FDCPA section 805(b) by leaving a voicemail message that stated, ''We have an important message from J.C. Christensen & Associates. This is a call from a debt collector. Please call 866–319–8619.''); *Zweigenhaft* v. *Receivables Performance Mgmt., LLC,* No. 14 CV 01074 RJD JMA, 2014 WL 6085912, at *1 (E.D.N.Y. Nov. 13, 2014) (similar); *Biggs* v. *Credit Collections, Inc.,* No. CIV–07–0053–F, 2007 WL 4034997, at *4 (W.D. Okla. Nov. 15, 2007) (''Words matter—in this instance, the words of the voice mails and the words of the statutory definition of a 'communication.' The transcript of the voice mail messages demonstrates that the voice mails 'convey[ed]' no 'information regarding a debt.' No amount of liberal construction can broaden the statutory language to encompass the words recorded in these voice mails.''); *see also* Consent Order at ¶ IV.A., *Fed. Trade Comm'n* v. *Expert Global Solutions, Inc.,* No. 3:13–cv–02611–M (N.D. Tex. July 16, 2013), *https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130709ncoorder.pdf* (enjoining defendant debt collector from leaving recorded messages in which defendant states both the debtor's name and that the caller is a debt collector, unless the recipient's voicemail greeting identifies only the debtor's first and last name or defendant has already spoken with the debtor at the called number).

[174] *See, e.g.,* Small Business Review Panel Report, *supra* note 57, at 25–26.

[175] See the section-by-section analysis of proposed § 1006.14(b)(2).

[176] *See* Bureau of Consumer Fin. Prot., Advanced Notice of Proposed Rulemaking, Debt Collection (Regulation F), 78 FR 67848, 67867 (Nov. 12, 2013) (noting that debt collectors believe that recent case law presents a dilemma in which a debt collector's voicemail for a consumer may not be able to comply with both FDCPA sections 805(b) and 807(11)); Fed. Trade Comm'n, *Collecting Consumer Debts: The Challenges of Change,* at 36 n.228 (Feb. 2009), *https://www.ftc.gov/sites/default/files/documents/reports/collecting-consumer-debts-challenges-change-federal-trade-commission-workshop-report/dcwr.pdf* (hereinafter FTC Modernization Report) (summarizing industry members' comments that conflicting case law on debt collectors' ability to communicate by newer forms of technology deters debt collectors from using such technologies, including leaving voicemails); *id.* at 47–49 (noting industry commenters' concerns about their ability to leave voicemails that comply with the FDCPA and recommending that the law regarding voicemails be clarified).

[177] *See* FTC Modernization Report, *supra* note 176, at 49–50; U.S. Gov't Accountability. Off., GAO–09–748, *Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology,* at 47–48, 52 (Sept. 2009), *http://www.gao.gov/assets/300/295588.pdf.*

implemented by proposed § 1006.6(d)) if someone other than the consumer heard or received the message.

The proposal would define a limited-content message as, in part, a message ''for a consumer.'' As a result, any message left for a person other than a consumer would not be a limited-content message. FDCPA section 807(11)'s requirement that a debt collector disclose that the purpose of a communication is to collect a debt and that any information obtained will be used for that purpose applies only when a debt collector is communicating ''with the consumer.'' Concerns about the intersection of FDCPA sections 805(b) and 807(11) are thus not as relevant when a debt collector contacts a person other than a consumer. In addition, because debt collectors generally are prohibited from communicating with a person other than the consumer, they generally have no need to contact third parties, and, when such communications are permitted for obtaining location information about a consumer, FDCPA section 804 already provides a comprehensive disclosure regime. Therefore, it may not be necessary to specify the content of a message that does not constitute a communication if left by a debt collector for a person other than the consumer.

The proposal would enable a debt collector to transmit a limited-content message by voicemail, by text message, or orally. Debt collectors may be most likely to use these methods to send limited-content messages, and these methods may be most likely to generate a response from a consumer. The proposal would not enable a debt collector to transmit a limited-content message by email because, as discussed below, email messages typically require additional information (*e.g.,* a sender's email address) that may in some circumstances convey information about a debt, and consumers may be unlikely to read or respond to an email containing solely the information included in a limited-content message (*e.g.,* consumers may disregard such an email as spam or a security risk). In addition, other aspects of the proposed rule (*e.g.,* the procedures described in proposed § 1006.6(d)(3) for emails and text messages) may encourage debt collectors to send debt collection communications to consumers by email. Accordingly, a rule that would enable debt collectors to send limited-content messages by email might not sufficiently protect consumers' privacy interests or be of significant benefit to debt collectors.

Proposed comment 2(j)–1 explains that any message other than a message that includes the content specified in § 1006.2(j) is not a limited-content message. The comment further explains that, if a message includes any other content and such other content directly or indirectly conveys any information about a debt, including but not limited to any information that indicates that the message relates to the collection of a debt, the message would be a communication, as defined in proposed § 1006.2(d). Proposed comment 2(j)–2 provides examples of limited-content messages.

Proposed comment 2(j)–3 provides examples of ways in which a debt collector could transmit a limited-content message to a consumer, such as by leaving a voicemail at the consumer's telephone number, sending a text message to the consumer's mobile telephone number, or leaving a message orally with a third party who answers the consumer's home or mobile telephone number. Proposed comment 2(j)–3 notes, however, that leaving a limited-content message would be subject to other FDCPA provisions, including the prohibitions on harassing or abusive conduct and unfair or unconscionable practices in FDCPA sections 806 and 808, respectively.[178] As the section-by-section analyses of proposed §§ 1006.2(b) and (d), 1006.6(b) and (c), 1006.14(h), and 1006.22(f)(3) and (4) explain in more detail, consumers may be harassed or otherwise injured not only by communications, but also by attempts to communicate, including when a debt collector conveys limited-content messages. Accordingly, those sections propose certain restrictions on when and how a debt collector may attempt to communicate with a person, including by leaving a limited-content message.

Proposed comment 2(j)–4 would clarify that a debt collector who places a telephone call and leaves only a limited-content message for a consumer does not, with respect to that telephone call, violate FDCPA section 806(6)'s prohibition on the placement of telephone calls without meaningful disclosure of the caller's identity. Under the proposed interpretation, the content described in proposed § 1006.2(j)(1) would meaningfully disclose the caller's identity. The proposed interpretation would be limited to the narrow circumstance of a debt collector providing only a limited-content message to a consumer. As described below, proposed § 1006.2(j)(1) would require a limited-content message to include the name of a natural person whom the consumer could contact as well as a telephone number that the consumer could use to reply to the debt collector; a limited-content message could not contain any content that is not described in proposed § 1006.2(j)(1) or (2), and debt collectors would be prohibited from including false or misleading statements about the caller's identity or the purpose of the call. As a result, the message should not mislead a consumer about the identity of the caller and the consumer could use the contact information to call a particular employee of a debt collector. Upon receiving such a call and engaging in a communication, the debt collector would be required by FDCPA section 807(11) to disclose to the consumer that the communication is from a debt collector. This sequence of events—a limited-content message followed by a communication in which the debt collector provides the FDCPA section 807(11) disclosures—may benefit consumers more than the status quo, under which many debt collectors place repeated telephone calls without leaving any message or any contact information that the consumer can use to reply to the debt collector.

The interpretation in proposed comment 2(j)–4 would apply only when a debt collector places a telephone call and leaves only a limited-content message for a consumer. It would not extend to any other message a debt collector leaves for a consumer or other person, as such messages might not include all of the content that must be included in a limited-content message, might include content that is not described in proposed § 1006.2(j)(1) or (2) and that conveys a misleading impression about the caller's identity or purpose of the call, or might constitute a communication that is subject to FDCPA section 807(11) or that otherwise would need to include different disclosures about the caller's identity and purpose in order to satisfy FDCPA section 806(6). Similarly, the rationale in proposed comment 2(j)–4 would not extend to a telephone call that is a live conversation with the consumer because, again, the content of such a conversation would be different than the content of a limited-content message.

The Bureau requests comment on whether the proposal to define a limited-content message that a debt collector could leave for a consumer without risking a violation of FDCPA sections 805(b) or 807(11) will enable debt collectors to establish contact with consumers while reducing the number of telephone calls that consumers receive. The Bureau further requests comment on the costs and benefits of

[178] 15 U.S.C. 1692d, 1692f.

permitting debt collectors to leave limited-content messages for consumers, including on whether those costs and benefits differ depending on whether a debt collector leaves a limited-content message: (1) In a voicemail message on a home, mobile, or work telephone; (2) in a live conversation with a third party who answers the consumer's home, mobile, or work telephone number; or (3) by text message. The Bureau requests comment on whether there are other communication media, such as email, by which debt collectors should be permitted to leave limited-content messages, including in particular on the advantages and disadvantages of the proposed approach, which would not permit debt collectors to send limited-content messages by email. In addition, the Bureau requests comment on whether a debt collector should be permitted to leave limited-content messages with third parties only in certain circumstances (*e.g.,* if a third party answers the consumer's telephone number) and whether a debt collector should be able to include additional content in a limited-content message if leaving it with a third party (*e.g.,* a request that the third party take a message).

The Bureau also requests comment on the proposed commentary. In particular, the Bureau requests comment on whether proposed comment 2(j)–4 properly interprets the requirement to ''meaningful[ly] disclose the caller's identity'' as satisfied when a debt collector places a telephone call and leaves only a limited-content message, and on whether there are other disclosures that would satisfy the meaningful disclosure requirement of FDCPA section 806(6) without causing the message to become a communication (*i.e.,* without conveying information about a debt directly or indirectly to any person).

During the SBREFA process, small entity representatives overwhelmingly supported a rule clarifying how and when a debt collector may leave a voicemail or other message for a consumer.[179] They predicted that a rule defining a limited-content message that is not a communication under the FDCPA would reduce the number and frequency of collection calls as well as facilitate communications between debt collectors and consumers. The Small Business Review Panel Report recommended that the Bureau request comment on the costs and benefits of any limited-content message proposal, including on the costs and benefits of providing limited-content messages by media other than telephone, and of any proposal that would require debt collectors to include a toll-free callback telephone number in a limited-content message (as the proposal then under consideration would have).[180] Proposed § 1006.2(j) and the requests for comment in this section are consistent with the feedback received during the SBREFA process, which supported a definition of limited-content message, and the Panel Report's recommendations.

2(j)(1) Required Content

Proposed § 1006.2(j)(1) would require that limited-content messages include certain content to ensure that they facilitate contact between debt collectors and consumers. In particular, proposed § 1006.2(j)(1) provides that a limited-content message must include all of the following: The consumer's name, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector,[181] a telephone number that the consumer can use to reply to the debt collector,[182] and, if delivered electronically, a disclosure explaining how the consumer can stop receiving messages through that medium.[183] The consumer's name and a request that the consumer reply to the message may help to ensure that the correct person receives the message and is prompted to respond. Including in the message a telephone number that the consumer can use to reply to the message, as well as the name of at least one person the consumer can speak to, should enable the consumer to reply to the message and interact with a debt collector's employee who has access to information about the debt in collection. In the case of a limited-content message sent by text message, a disclosure explaining how the consumer can stop receiving such messages may help prevent harassment, as further explained in the section-by-section analysis of proposed § 1006.6(e). In addition, the Bureau understands that the content required by § 1006.2(j)(1) often is included in a voicemail or other message for a person in a wide variety of non-debt collection circumstances, so a third party hearing or observing the message may not infer from its content that the consumer owes a debt. Under this proposed interpretation, none of the items in the limited-content message themselves individually or collectively convey that the consumer owes a debt or other information regarding a debt.

Proposed comment 2(j)(1)(iv)–1 notes that a limited-content message must include a telephone number that the consumer can use to reply to the debt collector. The proposed comment explains that a voicemail or a text message that spells out, rather than enumerates numerically, a vanity telephone number is not a limited-content message. Spelling out a vanity telephone number could, in some circumstances, convey information about a debt or otherwise disclose that the message is from a debt collector. The Bureau considered permitting such telephone numbers to be included in limited-content messages on the condition that they do not convey information about a debt, but such a condition would require a case-by-case analysis to determine if a particular vanity number conveyed information about a debt. As a result, permitting the inclusion of a vanity number in any or all circumstances could undermine the certainty that the limited-content message definition is designed to provide and could increase the risk that a third party hearing or observing the message could infer that it relates to debt collection. Similarly, the sender's email address could, in some circumstances, convey information about a debt. In part for that reason, proposed § 1002.2(j) would not permit a limited-content message to include a sender's email address and, consequently, would effectively prohibit sending a limited-content message by email. As discussed, debt collectors also may have less of a need to send a limited-content message by email because proposed § 1006.6(d)(3) would clarify the procedures that a debt

[179] Small Business Review Panel Report, *supra* note 57, at 36.

[180] *Id.*

[181] Proposed § 1006.18(f) would clarify that a debt collector's employee does not violate § 1006.18 by using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the employer can readily identify any employee who is using an assumed name. See the section-by-section analysis of proposed § 1006.18(f).

[182] The proposal under consideration during the SBREFA process would have required the telephone number to be toll-free to the consumer (*e.g.,* a 1–800 number). *See* Small Business Review Panel Outline, *supra* note 56, at 24. In light of feedback from some small entity representatives regarding the potential costs of maintaining a 1–800 number for the sole purpose of being able to transmit limited-content messages, the proposed rule would not require a toll-free telephone number.

[183] Proposed § 1006.6(e) would require a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using, among other things, a telephone number for text messages or other electronic-medium address, to include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. See the section-by-section analysis of proposed § 1006.6(e).

collector could maintain to avoid incurring liability for a prohibited third-party communication by email, thereby reducing the risk to debt collectors of sending debt collection communications to consumers by email.

2(j)(2) Optional Content

Proposed § 1006.2(j)(2) would permit a debt collector to include in a limited-content message certain content that may help prompt a consumer to reply but that, unlike the content described in proposed § 1006.2(j)(1), may not be necessary to enable the consumer to reply to the message or to prevent harassment. In particular, proposed § 1006.2(j)(2) provides that a limited-content message also may include one or more of the following: A salutation, the date and time of the message, a generic statement that the message relates to an account, and suggested dates and times for the consumer to reply to the message. The proposed interpretation would hold that none of these items, individually or collectively, conveys that the consumer owes a debt or other information regarding a debt.

The Bureau requests comment on all aspects of proposed § 1006.2(j), including on the proposed interpretation that none of the content described in proposed § 1006.2(j)(1) and (2) conveys information regarding a debt. The Bureau also requests comment on whether the proposal to allow a limited-content message to include a generic statement that the message relates to an ''account'' raises a risk that the message would convey information about a debt to a third party hearing or observing the message, and whether there is an alternative statement that would better minimize such risk. For example, the Bureau considered proposing permitting a limited-content message to state that the message relates to a ''personal,'' ''business,'' ''confidential,'' ''private,'' ''important,'' or ''time-sensitive'' matter, but each of these might, in at least certain contexts, be misleading or confusing to a consumer. The Bureau further requests comment on whether there is sufficient information required or permitted in the limited-content message to prompt consumers to make a return call or text to the included telephone number and, if not, what additional information could be included in the message that would not cause the message to constitute a communication. The Bureau also requests comment on whether including a sender or recipient email address or a vanity telephone number in a limited-content message could convey information about a debt to a third party hearing or observing the message and reduce the utility of a bright-line definition. Finally, the Bureau requests comment on the media by which debt collectors anticipate that they would send limited-content messages and on whether additional clarification is necessary regarding sending limited-content messages by media other than telephone.

2(k) Person

Proposed § 1006.2(k) would define the term person to have the meaning set forth in 1 U.S.C. 1, which provides that, ''in determining the meaning of any Act of Congress, unless the context indicates otherwise,'' the term person includes ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'' [184] The FDCPA does not define the term person, and the context does not appear to indicate that a meaning other than the meaning in 1 U.S.C. 1 should apply. The term person is used throughout the FDCPA and the proposed regulation. The Bureau proposes to define this term to facilitate compliance, with only minor wording changes from the statute.

Subpart B—Rules for FDCPA Debt Collectors [185]

Section 1006.6 Communications in Connection With Debt Collection

FDCPA section 805 generally limits how debt collectors may communicate with consumers and third parties when collecting debts.[186] Proposed § 1006.6 would implement and interpret FDCPA section 805; it also would interpret FDCPA sections 806 and 808 to provide certain additional protections regarding debt collection communications.

6(a) Definition

FDCPA section 805(d) provides that, for purposes of section 805, the term consumer includes certain individuals other than the person obligated or allegedly obligated to pay the debt. Accordingly, the protections in FDCPA section 805 apply to these individuals and the person obligated or allegedly obligated to pay the debt. Also, debt collectors may communicate with these individuals in connection with the collection of any debt without violating the FDCPA's prohibition on third-party disclosures.[187] For example, under FDCPA section 805(d), a debt collector may communicate not only with the consumer who owes or allegedly owes the debt, but also with the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator,[188] even though debt collectors generally are prohibited from communicating in connection with the collection of a debt with third parties.[189] A debt collector may communicate with third parties to seek location information about consumers, but the debt collector may not state that the consumer owes any debt.[190]

Proposed § 1006.6(a) would implement and interpret FDCPA section 805(d) and would define consumer for purposes of proposed §§ 1006.6 and 1006.14(h). Consistent with proposed § 1006.2(e), which, as described above, would interpret consumer to include deceased persons, proposed comments 6(a)(1)–1 and 6(a)(2)–1 would clarify that surviving spouses and parents of deceased minor consumers, respectively, are consumers for purposes of proposed § 1006.6. Except for these clarifications, and except for the interpretations discussed in the section-by-section analysis of proposed § 1006.6(a)(4) and (5), proposed § 1006.6(a) generally mirrors the statute. The section-by-section analysis below therefore addresses only proposed § 1006.6(a)(4) and (5).

6(a)(4)

Proposed § 1006.6(a)(4) would implement FDCPA section 805(d)'s definition of the term consumer as related to executors and administrators. Proposed § 1006.6(a)(4) generally restates the statute and its commentary also interprets FDCPA section 805(d) to include the personal representative of the deceased consumer's estate.

As discussed above, FDCPA section 805 generally limits the individuals with whom a debt collector may discuss the debt to those individuals identified as consumers in FDCPA section 805(d). If the consumer who owes or allegedly owes the debt is deceased, the consumer's family members may find that debt collectors are reluctant to communicate with the individuals attempting to resolve any outstanding debts of the decedent unless they are among the individuals identified in FDCPA section 805(d) with whom a debt collector may generally discuss the

[184] *See* 1 U.S.C. 1.

[185] Consistent with its proposal to amend Regulation F to prescribe Federal rules governing the activities of debt collectors, the Bureau proposes to move existing §§ 1006.3 through 1006.8 regarding applications for State exemptions from the FDCPA to appendix A of the regulation. See the section-by-section analysis of proposed § 1006.108 and appendix A.

[186] 15 U.S.C. 1692c.

[187] 15 U.S.C. 1692c(d).

[188] *Id.*

[189] *See* 15 U.S.C. 1692c(b).

[190] *See* 15 U.S.C. 1692b. For additional discussion of these provisions, see the section-by-section analyses of proposed §§ 1006.6(d) and 1006.10(c).

debt, *i.e.,* individuals with the title of executor or administrator under State law. This reluctance may delay the prompt resolution of estates.

The Bureau understands that most States currently provide procedures for resolving estates that are faster and less expensive than the formal probate process that may have been more common when Congress enacted the FDCPA more than 40 years ago. Under these expedited State procedures, an individual with the authority to pay the decedent's debts out of the assets of the estate may lack the particular title of executor or administrator under State law. The Bureau proposes to interpret the terms executor and administrator as used in the FDCPA to include personal representatives, which is defined in proposed comment 6(a)(4)–1 as any person who is authorized to act on behalf of the deceased consumer's estate. These terms are not defined in the FDCPA, and the FDCPA does not indicate that they are limited to persons who formally have the title of executor or administrator under State law. Rather, it is ambiguous whether the terms executor and administrator include personal representatives of a consumer's estate, as these persons serve the functions of executors or administrators but do not formally have that title. Accordingly, the Bureau proposes to interpret executor and administrator in a manner that is flexible enough to recognize the evolution in estate resolution processes over time, including the use of a personal representative to be the executor or administrator of the decedent's estate.[191]

The ability to resolve the debts of estates outside of the formal probate process through informal processes may benefit consumers. If a debt collector does not communicate with an estate because no executor or administrator exists, the debt collector might force the estate into probate, which could substantially burden the resources of the estate and the deceased consumer's heirs or beneficiaries. These burdens may be particularly acute for small estates and for individuals of limited means. Probate also adds costs and delays for debt collectors. In its Policy Statement on Decedent Debt, the FTC voiced similar concerns about unnecessarily pushing estates into probate. In light of such concerns, the FTC indicated that the agency would take no enforcement action against debt collectors who communicated about a decedent's debts with an individual who has the authority to pay the debts out of the assets of the deceased consumer's estate.[192]

For these reasons, and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.6(a)(4). The Bureau requests comment on proposed § 1006.6(a)(4).

Proposed comment 6(a)(4)–1 would clarify that the terms executor or administrator include the personal representative of the consumer's estate, and that a personal representative of the consumer's estate is any person who is authorized to act on behalf of the deceased consumer's estate. The proposed comment explains that persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's assets extrajudicially.

The term personal representative in comment 6(a)(4)–1 includes the same individuals as those recognized by the FTC's Policy Statement on Decedent Debt.[193] As the FTC has noted, some of the terms used to describe these individuals come from the Uniform Probate Code.[194] However, proposed comment 6(a)(4)–1 adapts the general description of the term personal representative from Regulation Z, 12 CFR 1026.11(c), comment 11(c)–1 (persons ''authorized to act on behalf of the estate'') rather than the general description found in the FTC's Policy Statement (persons with the ''authority to pay the decedent's debts from the assets of the decedent's estate.''). The Bureau believes that this change is non-substantive. The description of the term personal representative also reflects the language that a debt collector may use to acquire location information about the executor, administrator, or personal representative of the deceased consumer's estate, as explained in proposed comment 10(b)(2)–1.[195] The Bureau requests comment on the scope of the definition of personal representative in proposed comment 6(a)(4)–1 and on any ambiguity in the illustrative descriptions of personal representatives. The Bureau specifically requests comment on experiences under the FTC's Policy Statement on Decedent Debt.

In its Small Business Review Panel Outline, the Bureau stated that it was considering limiting the definition of personal representative to individuals recognized under State probate or estate laws.[196] However, the Bureau received feedback from industry indicating that many State laws define personal representative to mean an executor or administrator. In these States, the definition of personal representative under consideration in the Small Business Review Panel Outline would have restricted communication to formally appointed executors or administrators, which would not have alleviated the harms the Bureau intended to address. Proposed comment 6(a)(4)–1, which provides that a personal representative is any person who is authorized to act on behalf of the deceased consumer's estate, is designed to address this post-SBREFA feedback.

6(a)(5)

Proposed § 1006.6(a)(5) would interpret FDCPA section 805(d)'s definition of the term consumer to include confirmed successors in interest. Under Regulations X and Z, a successor in interest is a person to whom a borrower transfers an ownership interest either in a property securing a mortgage loan subject to subpart C of Regulation X, or in a dwelling securing a closed-end consumer credit transaction under Regulation Z, provided that the transfer is: (1) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety; (2) a transfer to a relative resulting from the death of a borrower; (3) a transfer where the spouse or children of the borrower become an owner of the property; (4) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or (5) a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to

[191] Additionally, the word ''includes'' in FDCPA section 805(d) indicates that section 805(d) is an exemplary, rather than an exhaustive, list of the categories of individuals who are consumers for purposes of FDCPA section 805. *See* 15 U.S.C. 1692c(d).

[192] Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts, 76 FR 44915, 44919 (July 27, 2011) (hereinafter FTC Policy Statement on Decedent Debt).

[193] *Id.*

[194] Statement of Policy Regarding Communications in Connection with Collection of a Decedent Debt, 75 FR 62389, 62391–92 (Oct. 8, 2010) (describing the processes of informal probate and administration and universal succession).

[195] See the section-by-section analysis of proposed § 1006.10(b).

[196] Small Business Review Panel Outline, *supra* note 56, at 32–33.

a transfer of rights of occupancy in the property.[197] A confirmed successor in interest, in turn, means a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the relevant property type.[198]

As the Bureau explained in its Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (2016 Servicing Final Rule) [199] and its concurrently issued FDCPA interpretive rule (2016 FDCPA Interpretive Rule),[200] the word ''includes'' in FDCPA section 805(d) indicates that section 805(d) is an exemplary, rather than an exhaustive, list of the categories of individuals who are consumers for purposes of FDCPA section 805. The Bureau explained that FDCPA section 805 recognizes the importance of permitting debt collectors to communicate with a narrow category of persons other than the individual who owes or allegedly owes the debt who, by virtue of their relationship to that individual, may need to communicate with the debt collector in connection with the collection of the debt. The Bureau further explained that, given their relationship to the individual who owes or allegedly owes the debt, confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of individuals with whom a debt collector needs to communicate about the debt. The Bureau therefore interpreted the term consumer for purposes of FDCPA section 805 to include a confirmed successor in interest as that term is defined in Regulation X, 12 CFR 1024.31, and Regulation Z, 12 CFR 1026.2(a)(27)(ii).[201]

Consistent with that interpretation, and pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau proposes to interpret FDCPA section 805(d) in § 1006.6(a)(5) to provide that a confirmed successor in interest, as defined in Regulations X and Z, is a consumer for purposes of proposed § 1006.6. The Bureau requests comment on proposed § 1006.6(a)(5), including on the benefits and risks of communications about debts between debt collectors and confirmed successors in interest.

6(b) Communications With a Consumer—In General

FDCPA section 805(a) restricts how a debt collector may communicate with a consumer in connection with the collection of any debt and provides certain exceptions to these prohibitions.[202] The Bureau generally proposes § 1006.6(b) to implement and interpret FDCPA section 805(a) to specify circumstances in which a debt collector is prohibited from communicating with a consumer in connection with the collection of any debt. In addition, the Bureau proposes § 1006.6(b) to interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer if FDCPA section 805(a) would prohibit the debt collector from communicating with the consumer. The Bureau proposes § 1006.6(b) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

Attempts To Communicate

The Bureau proposes to clarify in proposed § 1006.6(b) that a debt collector is prohibited from attempting to communicate with a consumer in the same circumstances in which FDCPA section 805(a) prohibits the debt collector from communicating with the consumer. As discussed, proposed § 1006.2(b) would define an attempt to communicate to mean any attempt by a debt collector to initiate contact with any person, including by soliciting a response from such person, regardless of whether the attempt, if successful, would be a communication as defined in proposed § 1006.2(d). For example, a debt collector who places a telephone call to the consumer that goes unanswered has attempted to communicate with the consumer. The phrase attempt to communicate thus appears throughout proposed § 1006.6(b)(1) through (4).

The Bureau proposes to limit attempts to communicate in § 1006.6(b) based on interpretations of FDCPA sections 806 and 808. FDCPA section 806 prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.[203] FDCPA section 806(5) provides that causing a telephone to ring repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number is an example of conduct the natural consequence of which is to harass, oppress, or abuse. FDCPA section 806(5) thus recognizes that telephone calls may have the natural consequence of harassment, oppression, or abuse even if no conversation ensues. A consumer who hears a telephone ringing at an inconvenient time or place but who does not answer it may experience the natural consequence of harassment from the telephone ringing in much the same way as a consumer who answers and speaks to the debt collector on the telephone. For this reason, the Bureau proposes to interpret FDCPA section 806 as prohibiting a debt collector from attempting to communicate at times when and places where a communication would be prohibited as inconvenient.

FDCPA section 808 prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt.[204] A debt collector who places a telephone call without the intent to speak to any person who answers the telephone (thus avoiding a communication for purposes of FDCPA section 805) may be causing injury to persons at the called number without any legitimate purpose, and thus may be engaging in a prohibited unfair or unconscionable act under FDCPA section 808. Additionally, section 808 targets practices that pressure a consumer to pay debts the consumer might not otherwise have paid. A debt collector's attempts to communicate at a time when or a place where a communication would be prohibited could pressure the consumer to pay the debt to avoid further intrusions on the consumer's privacy, and the Bureau interprets such conduct as unfair or unconscionable under FDCPA section 808. The Bureau requests comment on its proposed interpretations regarding attempts to communicate.

6(b)(1) Prohibitions Regarding Unusual or Inconvenient Times or Places

FDCPA section 805(a)(1) prohibits a debt collector from, among other things, communicating with a consumer in connection with the collection of any debt at times or places that the debt collector knows or should know are inconvenient to the consumer, subject to certain exceptions. As discussed in the section-by-section analysis below, proposed § 1006.6(b)(1)(i) and (ii)

[197] 12 CFR 1024.31; 1026.2(a)(27)(i).

[198] 12 CFR 1024.31; 1026.2(a)(27)(ii).

[199] 81 FR 72160 (Oct. 19, 2016).

[200] 81 FR 71977 (Oct. 19, 2016).

[201] *Id.* at 71979; 81 FR 72160, 72181 (Oct. 19, 2016).

[202] 15 U.S.C. 1692c(a). Specifically, FDCPA section 805(a)(1) prohibits certain communications at unusual or inconvenient times and places, section 805(a)(2) prohibits certain communications with a consumer represented by an attorney, and section 805(a)(3) prohibits certain communications at a consumer's place of employment.

[203] 15 U.S.C. 1692d.

[204] 15 U.S.C. 1692f.

generally would implement and interpret FDCPA section 805(a)(1).

Proposed comment 6(b)(1)–1 provides general interpretations and illustrations of the time and place restrictions in proposed § 1006.6(b)(1). Proposed comment 6(b)(1)–1 illustrates how a debt collector knows or should know that a time or place is inconvenient to a consumer. The proposed comment explains that a debt collector may know, or should know, that a time or place is inconvenient to a consumer if the consumer uses the word ''inconvenient'' to notify the debt collector. The proposed comment also explains that, even if the consumer does not use the word ''inconvenient'' to notify the debt collector, the debt collector nevertheless may know, or should know, based on the facts and circumstances, that a time or place is inconvenient. The Bureau proposes this interpretation because FDCPA section 805(a)(1) refers to what is ''inconvenient to the consumer,'' without specifying that a consumer must designate communications as inconvenient using the word ''inconvenient.'' The Bureau's proposed interpretation also is consistent with some case law holding that a consumer need not use the precise language of the statute to invoke the protections of FDCPA section 805.[205]

Proposed comment 6(b)(1)–1 would further clarify that, if the consumer initiates a communication with the debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once to that consumer-initiated communication at that time or place. Because the consumer initiated the communication, the debt collector neither knows nor should know that responding to that specific communication is inconvenient to the consumer. The debt collector is permitted to respond once. After that response, the debt collector must not communicate or attempt to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient. Proposed comment 6(b)(1)–1 also provides four specific examples of when a debt collector knows or should know that the time or place of a communication is inconvenient to a consumer.

The Bureau requests comment on proposed § 1006.6(b)(1) and on comment 6(b)(1)–1, including on whether other general clarifications regarding inconvenient times or places would be useful or whether other examples and illustrations would be instructive. The Bureau specifically requests comment on whether additional clarification is needed regarding the delivery of legally required communications at a time or place that a debt collector knows or should know is inconvenient to a particular consumer. The Bureau requests comment on whether to require a debt collector to ask a consumer at the outset of all debt collection communications whether the time or place is convenient to the consumer. The Bureau also requests comment on what effect a consumer-initiated communication should have on the times and places that a debt collector knows or should know are inconvenient to the consumer.

6(b)(1)(i)

FDCPA section 805(a)(1) provides, in relevant part, that a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer.[206] FDCPA section 805(a)(1) specifies that, in the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m., local time at the consumer's location.

Proposed § 1006.6(b)(1)(i) would implement and interpret FDCPA section 805(a)(1)'s prohibitions regarding unusual or inconvenient times.[207] The Bureau interprets the language in FDCPA section 805(a)(1) that a debt collector shall assume that the convenient time for communicating with a consumer is after 8:00 a.m. and before 9:00 p.m. to mean that a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient, unless the debt collector has knowledge of circumstances to the contrary. The Bureau requests comment on proposed § 1006.6(b)(1)(i).[208]

Proposed comment 6(b)(1)(i)–1 would clarify that, for purposes of determining the time of an electronic communication under § 1006.6(b)(1)(i), an electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it. Ambiguity exists about whether, for purposes of FDCPA section 805(a)(1), an electronic communication occurs at the time of sending or at the time of receipt or viewing. A rule that clarifies that an electronic communication occurs when the debt collector sends it makes it possible for a debt collector to comply. A debt collector can control the time at which it chooses to send communications, whereas it often would be impossible for a debt collector to determine when a consumer receives or views an electronic communication. Accordingly, under proposed § 1006.6(b)(1)(i), a debt collector would be prohibited from sending an electronic communication at a time that the debt collector knows or should know is inconvenient to the consumer. The Bureau requests comment on proposed comment 6(b)(1)(i)–1.

Proposed comment 6(b)(1)(i)–2 would provide a safe harbor and illustrate how a debt collector could comply with proposed § 1006.6(b)(1)(i) and FDCPA section 805(a)(1) if the debt collector has conflicting or ambiguous information regarding a consumer's location, such as telephone numbers with area codes located in different time zones or a telephone number with an area code and a physical address that are inconsistent. Proposed comment 6(b)(1)(i)–2 would clarify that, if a debt collector is unable to determine a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector would comply with the prohibition in § 1006.6(b)(1)(i) on communicating at inconvenient times if the debt collector communicated or attempted to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicated the consumer might be located. A debt collector with such conflicting information may know or should know that it is inconvenient to contact a consumer at a time outside of the presumptively convenient times (8:00 a.m. to 9:00 p.m.) in any of the time zones in which the consumer might be located. As indicated by some industry

[205] *See, e.g., Horkey* v. *J.V.D.B. & Assocs., Inc.,* 333 F.3d 769, 773 (7th Cir. 2003).

[206] 15 U.S.C. 1692c(a)(1).

[207] As discussed in the section-by-section analysis of proposed § 1006.6(b), proposed § 1006.6(b)(1)(i) also would interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at a time when FDCPA section 805(a)(1) would prohibit the debt collector from communicating with the consumer.

[208] In the Small Business Review Panel Outline, the Bureau described a proposal under consideration to define the 30-day period after the death of a consumer as an inconvenient time for communicating about the deceased consumer's debt with surviving spouses or parents (in the case of deceased minor consumers) or persons acting as executors, administrators, or personal representatives of a deceased consumer's estate. *See* Small Business Review Panel Outline, *supra* note 56, at 33. The proposed rule does not include such a waiting period. The Bureau requests evidence of specific consumer harm and benefits from debt collection communications occurring within 30 days after a consumer's death.

commenters in response to the Bureau's ANPRM, some debt collectors already have adopted this proposed approach for determining the convenient times to contact a consumer if the debt collector has conflicting location information for the consumer. Proposed comment 6(b)(1)(i)–2 also provides two examples of how a debt collector could comply with proposed § 1006.6(b)(1)(i). The Bureau requests comment on proposed comment 6(b)(1)(i)–2.

6(b)(1)(ii)

FDCPA section 805(a)(1) provides, in relevant part, that a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.[209] Proposed § 1006.6(b)(1)(ii) would implement this prohibition and generally restates the statute, with only minor changes for clarity.[210] [211]

6(b)(2) Prohibitions Regarding Consumer Represented by an Attorney

FDCPA section 805(a)(2) prohibits a debt collector from communicating with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to the debt and has knowledge of, or can readily ascertain, the attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.[212] Proposed § 1006.6(b)(2) would implement this prohibition and generally restates the statute.[213] The Bureau requests comment on proposed § 1006.6(b)(2), including whether additional clarification regarding this prohibition would be useful.

6(b)(3) Prohibitions Regarding Consumer's Place of Employment

FDCPA section 805(a)(3) prohibits a debt collector from communicating with a consumer in connection with the collection of any debt at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[214] Proposed § 1006.6(b)(3) would implement this prohibition and generally restates the statute.[215]

Even under circumstances where proposed § 1006.6(b)(3) may not apply because the debt collector does not know or have reason to know that a consumer's employer prohibits the consumer from receiving communications in connection with the collection of a debt at the consumer's place of employment, proposed § 1006.22(f)(3), discussed below, would prohibit the debt collector from communicating or attempting to communicate with the consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless an exception under proposed § 1006.22(f)(3) applies (*i.e.,* the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address).[216] Proposed comment 6(b)(3)–1 cross-references the employer-provided email rule described in proposed § 1006.22(f)(3).

The Bureau requests comment on proposed § 1006.6(b)(3). The Bureau also requests comment on whether additional clarification would be useful with respect to a debt collector's communications or attempts to communicate with a consumer while at work, for example, on a consumer's non-work mobile telephone or portable electronic device.

6(b)(4) Exceptions

FDCPA section 805(a) provides certain exceptions to its limitations on a debt collector's communications with a consumer. Proposed § 1006.6(b)(4) would implement and interpret the exceptions in FDCPA section 805(a).

6(b)(4)(i)

Proposed § 1006.6(b)(4)(i) would implement the text in FDCPA section 805(a) that, in relevant part, sets forth the exception for the prior consent of the consumer given directly to the debt collector.[217] Proposed § 1006.6(b)(4)(i) generally mirrors the statute, except that proposed § 1006.6(b)(4)(i) would interpret FDCPA section 805(a) to require that the consumer's prior consent must be given during a communication that would not violate proposed § 1006.6(b)(1) through (3), *i.e.,* the prohibitions on communications with a consumer at unusual or inconvenient times or places, communications with a consumer represented by an attorney, and communications at the consumer's place of employment. For example, ordinarily a debt collector could not place a telephone call to a consumer at midnight and obtain the consumer's prior consent for future debt collection communications. The Bureau interprets a consumer's prior consent to be consent obtained in the absence of conduct that would compromise or eliminate a consumer's ability to freely choose whether to consent. A communication that would violate proposed § 1006.6(b)(1) through (3) (*e.g.,* consent obtained from a represented consumer where the consumer's attorney is not present) is likely to compromise or eliminate a consumer's ability to freely choose whether to consent. By addressing only prior consent purported to be obtained during a communication that would violate proposed § 1006.6(b)(1) through (3), the Bureau does not intend to suggest that prior consent obtained in other unlawful ways would comply with FDCPA section 805(a).

Proposed comments 6(b)(4)(i)–1 and –2 would clarify the meaning of prior consent.[218] Proposed comment 6(b)(4)(i)–1 explains that, if a debt collector learns during a communication that the debt collector is communicating with a consumer at an inconvenient time or place, the debt collector cannot during that communication ask the consumer to consent to the continuation of that debt collection communication. The Bureau proposes this comment because consent that satisfies proposed § 1006.6(b)(4)(i) must be ''prior'' and therefore given in advance of a communication that otherwise would violate proposed § 1006.6(b)(1) through

[209] 15 U.S.C. 1692c(a)(1).

[210] As discussed in the section-by-section analysis of proposed § 1006.6(b), proposed § 1006.6(b)(1)(ii) also would interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at a place at which FDCPA section 805(a)(1) would prohibit the debt collector from communicating with the consumer.

[211] In the Small Business Review Panel Outline, the Bureau described a proposal under consideration to designate four categories of places as presumptively inconvenient. *See* Small Business Review Panel Outline, *supra* note 56, at 29–30. In response to feedback received during the SBREFA process, the Bureau does not propose that intervention at this time.

[212] 15 U.S.C. 1692c(a)(2).

[213] As discussed in the section-by-section analysis of proposed § 1006.6(b), proposed § 1006.6(b)(2) also would interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer who is represented by an attorney if FDCPA section 805(a)(2) would prohibit the debt collector from communicating with that consumer.

[214] 15 U.S.C. 1692c(a)(3).

[215] As discussed in the section-by-section analysis of proposed § 1006.6(b), proposed § 1006.6(b)(3) also would interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer at the consumer's place of employment if FDCPA section 805(a)(3) would prohibit the debt collector from communicating with the consumer there.

[216] For additional discussion of proposed work email restrictions, see the section-by-section analysis of proposed § 1006.22(f)(3).

[217] 15 U.S.C. 1692c(a).

[218] The interpretations and illustrations of prior consent discussed here also apply to proposed §§ 1006.14(b) and 1006.22(f), as discussed in the corresponding section-by-section analyses below.

(3). Additionally, permitting a debt collector to ask a consumer to consent to a communication once the debt collector knows the communication is occurring at an inconvenient time or place would undermine the very protection guaranteed to the consumer under FDCPA section 805(a)(1). Although proposed comment 6(b)(4)(i)–1 would clarify that the debt collector would be prohibited from asking the consumer to consent to the continuation of the communication at the inconvenient time or place, the comment also would clarify that a debt collector may ask the consumer what time or place would be convenient.

Proposed comment 6(b)(4)(i)–2 restates the rule that the prior consent of the consumer must be given directly to the debt collector and explains that a debt collector cannot rely on the prior consent of the consumer given to the original creditor or to a previous debt collector. The Bureau proposes this interpretation because prior consent given to the original creditor or to a previous debt collector is not given ''directly'' to the debt collector, as the FDCPA expressly requires.[219] The Bureau requests comment on proposed § 1006.6(b)(4)(i) and its related commentary, including on whether additional clarification regarding a consumer's prior consent for the purposes of these rule provisions would be instructive. Additionally, because the definition of consumer for purposes of proposed § 1006.6 includes the individuals listed in proposed § 1006.6(a)(1) through (5) (*e.g.,* the consumer's spouse), the Bureau requests comment on whether additional clarification is needed regarding which ''consumer'' may give prior consent pursuant to proposed § 1006.6(b)(4)(i).

6(b)(4)(ii)

Proposed § 1006.6(b)(4)(ii) would implement the text in FDCPA section 805(a) that, in relevant part, sets forth the exception for the express permission of a court of competent jurisdiction.[220] Proposed § 1006.6(b)(4)(ii) generally restates the statute, with only minor changes for clarity.

6(c) Communications With a Consumer—After Refusal To Pay or Cease Communication Notice

FDCPA section 805(c) provides that, subject to certain exceptions, if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt (the ''cease communication provision'').[221] The Bureau proposes § 1006.6(c) to implement and interpret FDCPA section 805(c) and pursuant to the Bureau's authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

6(c)(1) Prohibitions

Proposed § 1006.6(c)(1) would implement FDCPA section 805(c)'s cease communication provision and generally restates the statute, with only minor changes for clarity. Specifically, proposed § 1006.6(c)(1) would provide that, except as provided in proposed § 1006.6(c)(2), a debt collector must not communicate or attempt to communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that: (i) The consumer refuses to pay the debt; or (ii) the consumer wants the debt collector to cease further communication with the consumer.[222]

The Bureau proposes to interpret the applicability of the E-SIGN Act to a consumer electronically notifying a debt collector that the consumer wants the debt collector to cease further communication.[223] Specifically, the Bureau proposes to interpret FDCPA section 805(c)'s writing requirement as being satisfied if a consumer notifies a debt collector using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as email or a website portal. Thus, a debt collector would be required to give legal effect to a consumer's notification submitted electronically only if the debt collector generally chose to accept electronic communications from consumers. The Bureau proposes to codify this interpretation of the E-SIGN Act in proposed comment 6(c)(1)–2.

Proposed comment 6(c)(1)–1 would implement FDCPA section 805(c)'s provision that, if such notice is made by mail, a consumer's notification is complete upon receipt by the debt collector.[224] Proposed comment 6(c)(1)–1 would apply this standard to all written or electronic forms of a consumer's notification. The Bureau notes that FDCPA section 805(c) does not state that *only* mail notifications are complete upon receipt, but rather leaves vague when other forms of notification are complete. The Bureau proposes to clarify this ambiguity by providing that written or electronic forms of notification are complete upon receipt. The Bureau proposes this clarification on the basis that, regardless of the medium, before a debt collector has received a notification, it may not be reasonable to consider the debt collector to have been notified. On the other hand, once the debt collector has received a notification, the debt collector can reasonably be considered to have been notified.

The Bureau requests comment on proposed § 1006.6(c)(1) and on proposed comment 6(c)(1)–1, including on: Whether additional clarification is needed with respect to a consumer's notification pursuant to proposed § 1006.6(c)(1) being complete upon receipt by the debt collector; whether a debt collector should be afforded a certain period of time to update its systems to reflect the consumer's request even after the notification is received, and, if so, how long; and whether receipt works differently for different written and electronic communication media. Additionally, because the definition of consumer for purposes of proposed § 1006.6 includes the individuals listed in proposed § 1006.6(a)(1) through (5) (*e.g.,* the consumer's spouse), the Bureau requests comment on whether additional clarification is needed regarding which ''consumer'' may notify the debt collector pursuant to proposed § 1006.6(c)(1).

6(c)(2) Exceptions

FDCPA section 805(c) provides exceptions to the cease communication provision. The exceptions allow a debt collector to communicate with a

[219] This proposal is also consistent with the FDCPA's legislative history. *See* H. Rept. No. 95–131, at 5 (1977) (''The committee intends that in section [805] the 'prior consent' be meaningful, *i.e.,* that any prior consent by a consumer is to be a voluntary consent and shall be expressed by the consumer directly to the debt collector. Consequently, the committee intends that any term in a contract which requires a consumer to consent in advance to debt collection communication would not constitute 'prior consent' by such consumer.'').

[220] 15 U.S.C. 1692c(a).

[221] 15 U.S.C. 1692c(c).

[222] For the same reasons that proposed § 1006.6(b) would prohibit debt collectors from attempting to communicate with consumers if FDCPA section 805(a) would prohibit communications with consumers, proposed § 1006.6(c) would interpret FDCPA sections 806 and 808 to prohibit a debt collector from attempting to communicate with a consumer if FDCPA section 805(c) would prohibit the debt collector from communicating with the consumer.

[223] Section 104(b)(1)(A) of the E-SIGN Act provides authority for a Federal regulatory agency with rulemaking authority under a statute to interpret section 101 of the E-SIGN Act with respect to that statute by regulation. 15 U.S.C. 7004(b)(1)(A).

[224] 15 U.S.C. 1692c(c).

consumer even after a consumer has notified a debt collector pursuant to FDCPA section 805(c)'s cease communication provision: (1) To advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[225] Proposed § 1006.6(c)(2) would implement these exceptions and generally restates the statute, with only minor changes for clarity.

In the 2016 Servicing Final Rule [226] and the concurrently issued 2016 FDCPA Interpretive Rule,[227] the Bureau interpreted the written early intervention notice required in Regulation X, 12 CFR 1024.39(d)(3), to fall within the exceptions to the cease communication provision in FDCPA section 805(c)(2) and (3). As the Bureau explained in the 2016 Servicing Final Rule, the Bureau concluded that, because failure to provide the written early intervention notice required by Regulation X, 12 CFR 1024.39(d)(3), is closely linked to the ability of a mortgage servicer (who also is a debt collector subject to the FDCPA with respect to a mortgage loan) to invoke its specified remedy of foreclosure, the notice falls within the exceptions in FDCPA sections 805(c)(2) and (3).[228] For a further discussion of the requirement in Regulation X, see the 2016 Servicing Final Rule's section-by-section analysis discussion of 12 CFR 1024.39(d)(3).[229] The Bureau proposes comment 6(c)(2)–1 to incorporate by reference this interpretation, which applies to a mortgage servicer who also is a debt collector subject to the FDCPA with respect to a mortgage loan.

6(d) Communications With Third Parties

FDCPA section 805(b) prohibits a debt collector from communicating, in connection with the collection of any debt, with any person other than the consumer or certain other persons.[230] FDCPA section 805(b) also identifies certain exceptions to this prohibition. Proposed § 1006.6(d)(1) would implement FDCPA section 805(b)'s general prohibition against communicating with third parties, and proposed § 1006.6(d)(2) would implement the exceptions. Proposed § 1006.6(d)(3) would specify, for purposes of FDCPA section 813(c), procedures that are reasonably adapted to avoid an error in sending an email or text message that would result in a violation of FDCPA section 805(b). The Bureau proposes § 1006.6(d) pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors.

6(d)(1) Prohibitions

With limited exceptions, FDCPA section 805(b) prohibits a debt collector from communicating, in connection with the collection of any debt, with any person other than the consumer (as defined in FDCPA section 805(d)) or certain other persons. Proposed § 1006.6(d)(1) would implement FDCPA section 805(b) and generally restates the statute, with minor wording and organizational changes for clarity. Proposed comment 6(d)(1)–1 explains that, because a limited-content message is not a communication, a debt collector does not violate § 1006.6(d)(1) if the debt collector leaves a limited-content message for a consumer orally with a third party who answers the consumer's home or mobile telephone.[231] The comment explains that the message would be an attempt to communicate with the consumer (as defined in proposed § 1006.2(b)). It further explains, however, that if, during the course of the interaction with the third party, the debt collector conveys content other than the specific limited-content-message items described in proposed § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information regarding a debt, the message is a communication, subject to the prohibition on third-party communications in proposed § 1006.6(d)(1). The Bureau requests comment on proposed § 1006.6(d)(1) and on whether additional clarification would be useful.

6(d)(2) Exceptions

FDCPA section 805(b) specifies exceptions to the general prohibition against a debt collector communicating with third parties, including that a debt collector may engage in an otherwise prohibited communication with the prior consent of the consumer given directly to the debt collector. Proposed § 1006.6(d)(2) would implement the exceptions in FDCPA section 805(b) and generally restates the statute, with minor wording and organizational changes for clarity. Proposed comment 6(d)(2)–1 refers to the commentary to proposed § 1006.6(b)(4)(i) for guidance concerning a consumer giving prior consent directly to a debt collector. Additionally, because the definition of consumer for purposes of proposed § 1006.6 includes those individuals listed in proposed § 1006.6(a)(1) through (5) (*e.g.,* the consumer's spouse), the Bureau requests comment on whether additional clarification is needed regarding which consumer under proposed § 1006.6(a) may give prior consent pursuant to proposed § 1006.6(d).

6(d)(3) Reasonable Procedures for Email and Text Message Communications

FDCPA section 813(c) provides that a debt collector may not be held liable in any action brought under the FDCPA if the debt collector shows by a preponderance of evidence that the violation was not intentional, that it resulted from a bona fide error, and that it occurred even though the debt collector maintained procedures reasonably adapted to avoid the error.[232] Proposed § 1006.6(d)(3) identifies procedures that a debt collector may use to obtain a safe harbor from civil liability for unintentionally violating the third-party disclosure prohibition in proposed § 1006.6(d)(1) and, by extension, FDCPA section 805(b), as a result of a bona fide error resulting from a communication by email or text message.

FDCPA section 805(b) generally prohibits a debt collector from communicating with any person other than the consumer unless the consumer provides consent directly to the debt collector. FDCPA section 803(2), in turn, defines the term communication to include the conveying of information regarding a debt directly or indirectly to any person.[233] In the context of oral communications, courts have found that, if a debt collector leaves a voice message that is overheard by a third party, the debt collector may violate FDCPA section 805(b) by indirectly conveying information regarding a debt to a person other than the consumer.[234]

[225] 15 U.S.C. 1692c(c)(1)–(3).

[226] 81 FR 72160 (Oct. 19, 2016).

[227] 81 FR 71977 (Oct. 19, 2016).

[228] 81 FR 72160, 72232 (Oct. 19, 2016).

[229] *Id.* at 72233–38.

[230] 15 U.S.C. 1692c(b). Specifically, FDCPA section 805(b) prohibits communicating with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the creditor's attorney, or the debt collector's attorney.

[231] The Bureau separately requests comment in the section-by-section analysis of proposed § 1006.2(j) defining limited-content messages on whether to permit a debt collector to leave limited-content messages with third parties.

[232] 15 U.S.C. 1692k(c).

[233] See the section-by-section analysis of proposed § 1006.2(d).

[234] See the section-by-section analysis of proposed § 1006.2(j).

While nothing in the FDCPA prohibits debt collectors from communicating using newer communication media such as email and text messages, the case law regarding communications has given rise to uncertainty about how FDCPA section 805(b) applies to such media, because of the potential for inadvertent disclosure of communications to third parties. In pre-proposal feedback, several industry stakeholders asserted that this uncertainty, particularly about liability for third-party disclosures, discourages the use of electronic communications in debt collection.[235] Consistent with this feedback, the Bureau's Consumer Survey found that only 8 percent of consumers contacted by a debt collector were contacted by email—even though email is widely available and less expensive than other forms of communication, and 15 percent of surveyed consumers said that email was their most preferred method of being contacted about a debt in collection.[236] In pre-proposal feedback, industry participants expressed interest in communicating with consumers using electronic technologies. They therefore requested that the Bureau clarify how FDCPA section 805(b) applies to the inadvertent disclosure of an electronic communication to a third party not authorized to receive it.[237]

In light of this feedback and evidence suggesting that some consumers may prefer debt collectors to communicate by newer media, the Bureau proposes to identify procedures that debt collectors may use to reduce the risk of liability from communicating with consumers by email or text message. Pursuant to its authority to implement and interpret FDCPA sections 805(b) and 813(c), the Bureau proposes § 1006.6(d)(3) to specify when a debt collector maintains procedures that are reasonably adapted, for purposes of FDCPA section 813(c), to avoid a bona fide error in sending an email or text message communication that would result in a violation of § 1006.6(d)(1). A debt collector would maintain such procedures if, when communicating with a consumer using an email address or, in the case of a text message, a telephone number, the debt collector's procedures include steps to reasonably confirm and document that the debt collector: (1) Has obtained and used the email address or telephone number in accordance with one of the three methods specified in § 1006.6(d)(3)(i); and (2) has taken the additional steps specified in § 1006.6(d)(3)(ii).

The procedures in proposed § 1006.6(d)(3) are designed to ensure that a debt collector who uses a specific email address or telephone number to communicate with a consumer by email or text message does not have a reason to anticipate that an unauthorized third-party disclosure may occur. The FTC staff and some courts have found that debt collectors do not violate the prohibition on third-party disclosures unless they have reason to anticipate that the disclosure may be heard or read by third parties.[238] Designing the procedures around the reason-to-anticipate standard is consistent with these principles. A debt collector who follows the procedures in proposed § 1006.6(d)(3) may not have reason to anticipate that a disclosure may be heard or read by a third party.

Proposed § 1006.6(d)(3) would not fully eliminate a debt collector's risk of liability for third-party disclosures. To be protected from civil liability under FDCPA 813(c), a debt collector would need to show, by a preponderance of the evidence, that the debt collector's disclosure to the third party was unintentional and that the debt collector, in fact, maintained the specified procedures. As proposed, this would require a debt collector to show that the procedures included steps to reasonably confirm and document that the debt collector acted in accordance with proposed § 1006.6(d)(3)(i) and (ii). For example, procedures that permitted a debt collector to use obviously incorrect email addresses merely because the addresses were obtained consistent with one of the three methods would not satisfy proposed § 1006.6(d)(3)'s reasonableness requirement.[239]

The procedures in proposed § 1006.6(d)(3) address email and text message communications only. At this time, the Bureau does not propose procedures related to the use of less-developed and less-widespread forms of electronic communication because consumers do not appear accustomed to using such technologies in their financial lives. The Bureau may revisit this conclusion if consumer use of these technologies changes. The Bureau also does not propose procedures related to the use of voicemails. The limited-content message described in proposed § 1006.2(j) is designed to enable debt collectors to leave voicemails for consumers without risking third-party disclosures.

Proposed § 1006.6(d)(3) does not identify the only circumstances in which a debt collector may communicate with a consumer by email or text message, nor does it identify the only procedures that may be reasonably adapted to avoid a violation of proposed § 1006.6(d)(1) and FDCPA section 805(b). Thus, a debt collector would not necessarily violate proposed § 1006.6(d)(1) or FDCPA section 805(b) if the debt collector communicated with a consumer by email or text message without following the procedures in proposed § 1006.6(d)(3). Depending on the facts, a debt collector could show by a preponderance of the evidence that any third-party disclosures were unintentional and that the debt collector employed procedures reasonably adapted to avoid them.

The Bureau requests comment on proposed § 1006.6(d)(3). In particular, the Bureau requests comment on the risk of third-party disclosure and resulting consumer harm posed by debt collection communications that take place by email or text message. The

[235] An industry trade association commenting on the Bureau's ANPRM surveyed its members and found that only 15 percent of respondents communicated electronically with consumers, primarily because of concerns about liability. A later study by a consulting firm, released in 2017, reported that about one-third of debt collectors communicate with consumers by email. Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016: Prepared for ACA Int'l,* at 5 (Nov. 2017), *https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf*; *see also* Gov't Accountability Off., No. GAO–09–748, *Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology,* at 48 (Sept. 2009), *https://www.gao.gov/assets/300/295588.pdf* (''Debt collection agencies have been reluctant to use email and faxes to communicate with debtors because of the risk that someone other than the debtor may read the transmission, which could violate FDCPA's prohibition on disclosure to third parties.'').

[236] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 37, 42.

[237] For example, one industry trade association suggested that the Bureau establish a presumption against liability when debt collectors use consumer-provided email addresses and telephone numbers. In addition, a Federal regulator recently recommended that the Bureau ''codify that reasonable digital communications, especially when they reflect a consumer's preferred method, are appropriate for use in debt collection.'' U.S. Dept. of Treasury, *A Financial System that Creates Economic Opportunities: Nonbank Financials, FinTech, and Innovation,* at 21 (July 2018), *https://home.treasury.gov/news/press-releases/sm447.*

[238] *See, e.g., Statements of General Policy or Interpretation: Staff Commentary on the FDCPA,* 53 FR 50097, 50104 (Dec. 13, 1988) (''A debt collector does not violate [FDCPA section 805(b)] when an eavesdropper overhears a conversation with the consumer, unless the debt collector has reason to anticipate the conversation will be overheard.''); *Peak* v. *Prof'l Credit Serv.,* No. 6:14–cv–01856–AA, 2015 WL 7862774, at *5–6 (D. Or. Dec. 2, 2015); *Berg* v. *Merchants Ass'n Collection Div., Inc.,* 586 F. Supp. 2d 1336, 1342, 1345 (S.D. Fla 2008); *Chlanda* v. *Wymard,* No. C–3–93–321, 1995 WL 17917574, at *2 (S.D. Ohio Sept. 5, 1995).

[239] In addition, a debt collector who communicates with a consumer consistent with proposed § 1006.6(d)(3) would not be protected from liability for violations unrelated to third-party disclosures (*e.g.,* for failure to include the opt-out notice that proposed § 1006.6(e) would require).

Bureau is especially interested in any data or other information bearing on the harm associated with such disclosure. The Bureau also requests comment on whether the procedures identified in proposed § 1006.6(d)(3) are likely to increase debt collectors' use of emails and text messages to communicate with consumers. The Bureau also requests comment on whether additional clarification is needed about the requirement that a debt collector's procedures include steps to reasonably confirm and document that the debt collector acted in accordance with proposed § 1006.6(d)(3)(i) and (ii). In addition, the Bureau requests comment on whether to clarify the meaning of the term email in proposed § 1006.6(d)(3), such as by specifying that it includes direct messaging technology in mobile applications or on social media platforms.

6(d)(3)(i) Method of Obtaining and Using an Email Address or Telephone Number

Proposed § 1006.6(d)(3)(i) describes three methods of obtaining and using an email address or, in the case of a text message, a telephone number. As discussed below, a debt collector whose policies and procedures include steps to reasonably confirm and document compliance with proposed § 1006.6(d)(3)(i) would be entitled to a safe harbor from liability for an unintentional third-party disclosure resulting from use of one of the three methods, assuming the debt collector's procedures also include steps to reasonably confirm and document compliance with proposed § 1006.6(d)(3)(ii).

6(d)(3)(i)(A)

A debt collector who communicates with a consumer electronically using an email address or telephone number that the consumer recently used to contact the debt collector electronically may not have reason to anticipate that the communication may be read by third parties with whom the debt collector is not otherwise permitted to communicate about the debt. This is because, the Bureau believes, a consumer generally is better positioned than a debt collector to determine whether third parties have access to a specific email address or telephone number, and a consumer's decision to communicate electronically using a specific email address or telephone number may suggest that the consumer has assessed the risk of third-party disclosure to be low. For this reason, proposed § 1006.6(d)(3)(i)(A) provides that a debt collector could obtain [240] a safe harbor from liability for an unintentional third-party disclosure if the debt collector maintained procedures to reasonably confirm and document that the debt collector communicated with the consumer using an email address or, in the case of a text message, a telephone number that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications.[241]

Proposed § 1006.6(d)(3)(i)(A) would apply to any email address or, in the case of a text message, any telephone number—including any work email address or any work telephone number—the consumer used to contact the debt collector for purposes other than opting out of electronic communications. As discussed in the section-by-section analysis of proposed § 1006.22(f)(3), the proposed rule generally would prohibit a debt collector from attempting to communicate with a consumer using an email address that the debt collector knows or should know is maintained by the consumer's employer. Work emails appear to present a heightened risk of third-party disclosure because many employers have a legal right to read messages sent or received by employees on work email accounts, and some employers exercise that right. Text messages sent to a work telephone number appear to present a heightened risk of third-party disclosure for the same reason. However, some consumers may be in a position to assess the risk that an employer will read their work emails or work text messages based on, among other things, their knowledge of work policies and practices, so it may be reasonable for a debt collector to presume that a consumer who initiates an electronic communication with a debt collector using a work email address or work telephone number has assessed that risk to be low.

In addition, proposed § 1006.6(d)(3)(i)(A) would apply only if the consumer recently used the email address or telephone number to contact the debt collector. Telephone numbers frequently are disconnected and reassigned from one person to another. In fact, according to a recent Federal Communications Commission (FCC) notice of proposed rulemaking, nearly 35 million telephone numbers are disconnected and made available for reassignment each year.[242] Given the frequency with which telephone numbers are reassigned, it may be reasonable for a debt collector to anticipate that sending a text message to a telephone number that the consumer has not recently used could result in the disclosure of sensitive information to third parties—namely, persons to whom the consumer's telephone number has been reassigned. Because a telephone number the consumer recently used may be less likely to have been reassigned than a telephone number the consumer used in the more distant past, proposed § 1006.6(d)(3)(i)(A)'s recency requirement may limit the third-party disclosure risk posed by the reassignment of telephone numbers. Although email addresses do not appear to carry as great a risk of reassignment as telephone numbers,[243] for consistency and ease of administration of the regulation, the Bureau nevertheless proposes to apply the same recency requirement to email addresses.

The Bureau requests comment on proposed § 1006.6(d)(3)(i)(A). In particular, the Bureau requests comment on what, if anything, a consumer's decision to contact a debt collector using a work email address or, in the case of a text message, a work telephone number may suggest about the consumer's assessment of the risk of third-party disclosure. The Bureau also requests comment on what, if anything, a consumer's decision to contact a debt collector using a non-work email address or, in the case of a text message, a non-work telephone number may suggest about the consumer's

[240] To be entitled to a safe harbor, the debt collector's procedures also would need to comply with proposed § 1006.6(d)(3)(ii).

[241] As discussed in the section-by-section analysis of proposed § 1006.14(h)(2), if a consumer opts out of receiving electronic communications from a debt collector, the debt collector would be permitted to reply once to confirm the consumer's request to opt out, provided that the reply contains no information other than a statement confirming the consumer's request. Proposed § 1006.6(d)(3)(i)(A)'s safe harbor would not be available to a debt collector who sends the reply to an email address or, in the case of a text message, a telephone number that the consumer used only for purposes of opting out of electronic communications.

[242] *Advanced Methods to Target and Eliminate Unlawful Robocalls,* 83 FR 17631, 17632 (Apr. 23, 2018) (''Consumers disconnect their old numbers and change to new telephone numbers for a variety of reasons, including switching wireless providers without porting numbers and getting new wireline telephone numbers when they move.'').

[243] Although email addresses can be reassigned, the Bureau has not identified evidence suggesting that reassignment happens frequently. For example, one of the largest email providers states it does not reassign email addresses. *See Delete Your Gmail Service,* Google Account Help, *https://support.google.com/accounts/answer/61177?co=GENIE.Platform%3DDesktop&hl=en* (last visited May 6, 2019). One industry report suggests that a majority of consumers have never deactivated an email account. Direct Marketing Ass'n, *Consumer Email Tracker 2017,* at 6 (2017), *https://dma.org.uk/uploads/misc/5a1583ff3301a-consumer-email-tracking-report-2017-(2)_5a1583ff32f65.pdf.*

assessment of the risk of third-party disclosure. In addition, the Bureau requests comment on the third-party disclosure risks to consumers posed by the practice of reassigning telephone numbers. The Bureau also requests comment on whether the recency requirement in proposed § 1006.6(d)(3)(i)(A) adequately addresses those risks, and, if not, on how the Bureau could address them in a final rule. In addition, the Bureau requests comment on whether to apply the recency requirement to emails. The proposed rule does not define when a consumer's contact would qualify as recent. The Bureau therefore also requests comment on whether and how to define recent in the context of proposed § 1006.6(d)(3)(i)(A), including on whether contact by the consumer in the past year should qualify as recent.

6(d)(3)(i)(B)

A debt collector may not have reason to anticipate that an electronic communication to a consumer's non-work email address or non-work telephone number may be read by third parties with whom the debt collector is not otherwise permitted to communicate about the debt if the consumer has received notice and a reasonable opportunity to opt out of such communications, but the consumer has not done so. This is because, the Bureau believes, a consumer's failure to opt out in these circumstances may suggest that the consumer has assessed the risk of such a disclosure to be low. For this reason, proposed § 1006.6(d)(3)(i)(B) provides that a debt collector could obtain [244] a safe harbor from liability for an unintentional third-party disclosure if the debt collector maintained procedures to reasonably confirm and document that: (1) The debt collector communicated with the consumer using a non-work email address or, in the case of a text message, a non-work telephone number, after the creditor or the debt collector provided the consumer with notice that the debt collector might use that non-work email address or non-work telephone number for debt collection communications and a reasonable opportunity to opt out; and (2) the consumer did not opt out.

Proposed § 1006.6(d)(3)(i)(B) would apply only to non-work email addresses and non-work telephone numbers; it would not apply to work email addresses or work telephone numbers. A notice-and-opt-out process may not be reasonably designed to prevent employers from reading electronic debt collection communications sent to work email addresses and work telephone numbers. Unlike a consumer's affirmative decision to contact a debt collector using a work email address or, in the case of a text message, a work telephone number, as described in proposed § 1006.6(d)(3)(i)(A), a consumer's failure to opt out of the debt collector's use of a work email address or a work telephone number may not indicate that the consumer has assessed the risk of third-party disclosure to be low. Instead, it may reflect an unwillingness to engage with a debt collector in any manner—even to opt out of further communications—using a work email address or a work telephone number.

Proposed comment 6(d)(3)(i)–1 would clarify that an email address qualifies as a non-work email address unless the debt collector knows or should know that the email address is provided to the consumer by the consumer's employer. The proposed comment also refers to § 1006.22(f)(3) and its related commentary for further clarification regarding whether a debt collector knows or should know that an email address is provided by a consumer's employer. The proposed comment also would clarify that a telephone number qualifies as a non-work telephone number unless the debt collector knows or should know that the telephone number is provided to the consumer by the consumer's employer.

The Bureau requests comment on proposed § 1006.6(d)(3)(i)(B) and on comment 6(d)(3)(i)–1. In particular, the Bureau requests comment on what, if anything, a consumer's failure to opt out of a debt collector's use of a non-work email address or, in the case of a text message, a non-work telephone number may suggest about the consumer's assessment of the risk of third-party disclosure. The Bureau also requests comment on what, if anything, a consumer's failure to opt out of a debt collector's use of a work email address or, in the case of a text message, a work telephone number may suggest about the consumer's assessment of the risk of third-party disclosure.

6(d)(3)(i)(B)(1)

Proposed § 1006.6(d)(3)(i)(B)(*1*) describes three requirements that a debt collector using the notice-and-opt-out approach would need to confirm and document had been satisfied. First, the creditor or the debt collector would need to notify the consumer clearly and conspicuously that the debt collector might use a specific non-work email address or a specific non-work telephone number for debt collection communications by email or text message. The creditor or the debt collector may provide the notice orally, in writing, or electronically, but, if provided electronically, the notice could not be sent to the specific non-work email address or non-work telephone number the debt collector seeks to use for future communications. This limitation may help avoid a third-party disclosure through the notice itself, which could occur if the opt-out notice were sent to the email address or telephone number identified in the notice.

Second, the creditor or the debt collector would need to provide the notice no more than 30 days before the debt collector engages in debt collection communications by email or text message. This timing component is meant to ensure that the consumer has made a decision about whether to opt out, including based on the risk of third-party disclosure, at a time reasonably contemporaneous with the proposed electronic communications.

Third, the notice would need to identify the legal name of the debt collector and the non-work email address or non-work telephone number the debt collector proposes to use, describe one or more ways the consumer could opt out of such communications, and provide the consumer with a specified reasonable period during which to opt out before the debt collector would begin such communications. The content of the notice is meant to ensure that the notice includes enough information for the consumer to make an adequately informed decision about whether to opt out and, should the consumer elect not to opt out, to prepare to receive any electronic communications.[245]

Although the procedures described in proposed § 1006.6(d)(3)(i)(B) include steps to reasonably confirm and document that the creditor or the debt collector provided the opt-out notice described in proposed § 1006.6(d)(3)(i)(B)(*1*), they do not include a requirement to provide the notice itself in writing. Proposed comment 6(d)(3)(i)(B)(*1*)–1 would clarify that the opt-out notice described in § 1006.6(d)(3)(i)(B)(*1*) may be provided orally, in writing, or

[244] To be entitled to a safe harbor, the debt collector's procedures also would need to comply with proposed § 1006.6(d)(3)(ii).

[245] As explained below, the Bureau proposes comment 6(d)(3)(i)(B)(1)–2 to clarify that, when an opt-out notice is provided orally, the creditor or the debt collector may require the consumer to make an opt-out decision during that same communication. As also noted below, the Bureau does not propose to specify what would qualify as a reasonable opt-out period when an opt-out notice is provided in writing or electronically; however, the Bureau requests comment on this issue.

electronically. The proposed comment also would clarify that the opt-out notice must be provided clearly and conspicuously, as defined in § 1006.34(b)(1), and that, if the opt-out notice is provided in writing or electronically, it must comply with the requirements of § 1006.42(a) for providing required disclosures.[246] The Bureau proposes comment 6(d)(3)(i)(B)(*1*)–1 to provide consumers, debt collectors, and creditors with the flexibility to satisfy the proposed notice-and-opt-out requirements orally or electronically, which may be more convenient or efficient in some circumstances.

Proposed comment 6(d)(3)(i)(B)(*1*)–2 would clarify how to provide the opt-out notice described in proposed § 1006.6(d)(3)(i)(B)(*1*) to the consumer in an oral communication, such as in a telephone or in-person conversation. The comment explains that, if a creditor or a debt collector provides the opt-out notice orally, the creditor or the debt collector may require the consumer to make an opt-out decision during that same communication. Proposed comment 6(d)(3)(i)(B)(*1*)–2 appears consistent with industry practice in other markets for consumer financial products and services, where consumers may commonly make decisions about their communication preferences at one time, often at origination.

Proposed comment 6(d)(3)(i)(B)(*1*)–3 would clarify that a debt collector or a creditor may provide the opt-out notice together with other notices required under the rule. As discussed in the section-by-section analysis of proposed § 1006.42(c)(2)(ii) and (d), the proposed rule would permit a debt collector to deliver required disclosures by hyperlink if, among other things, the debt collector or a creditor first provided the consumer with notice and an opportunity to opt out. Because it may be more convenient and cost effective for consumers, debt collectors, and creditors if consumers can make their various communication preferences known at the same time, proposed comment 6(d)(3)(i)(B)(*1*)–3 would clarify that a debt collector or a creditor may include the opt-out notice described in § 1006.6(d)(3)(i)(B)(*1*) in the same communication as the opt-out notice described in § 1006.42(d)(1) or (2), as applicable.

The Bureau requests comment on proposed § 1006.6(d)(3)(i)(B)(*1*) and its related commentary. In particular, the Bureau requests comment on whether to limit further the email addresses or telephone numbers to which a creditor or a debt collector may send the opt-out notice that would be required by proposed § 1006.6(d)(3)(i)(B)(*1*) and, if so, what those limitations should be. The Bureau also requests comment on proposed § 1006.6(d)(3)(i)(B)(*1*)'s requirement to provide the notification no more than 30 days before the debt collector's first communication pursuant to proposed § 1006.6(d)(3)(i)(B), including on whether the period should be shortened or lengthened. The Bureau also requests comment on whether to clarify, for purposes of proposed § 1006.6(d)(3)(i)(B)(*1*), what constitutes a reasonable period within which to opt out when an opt-out notice is not provided through a telephone conversation. In addition, the Bureau requests comment on whether, in other consumer financial products and services markets, consumers commonly make decisions about their communication preferences during a single telephone call. The Bureau also requests comment on the benefits and risks of allowing debt collectors and creditors to include the opt-out notice described in proposed § 1006.6(d)(3)(i)(B)(*1*) in the same communication as the opt-out notice described in proposed § 1006.42(d)(1) or (2), as applicable.

6(d)(3)(i)(B)(2)

As discussed above, proposed § 1006.6(d)(3)(i)(B)(*1*) describes requirements that a debt collector using the notice-and-opt-out approach would need to confirm and document had been satisfied. One such requirement is to provide the consumer with a reasonable period during which to opt out of receiving debt collection communications by email or text message to the non-work email address or non-work telephone number identified in the opt-out notice. The consumer's failure to opt out in these circumstances may suggest that the consumer has assessed the risk of third-party disclosure to be low.[247] For this reason, proposed § 1006.6(d)(3)(i)(B)(*2*) provides that, if the opt-out period specified in the notice has expired and the consumer has not opted out, the debt collector may use the specific non-work email address or non-work telephone number to send debt collection communications by email or text message.

Proposed comment 6(d)(3)(i)(B)(*2*)–1 would clarify how proposed § 1006.6(d)(3)(i)(B)(*2*) would work with proposed § 1006.14(h), which would prohibit a debt collector from communicating or attempting to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer.[248] Proposed comment 6(d)(3)(i)(B)(*2*)–1 provides that, if a consumer requests after the expiration of the opt-out period set forth in the § 1006.6(d)(3)(i)(B)(*1*) opt-out notice that a debt collector not use the non-work email address or non-work telephone number specified in that notice, § 1006.14(h) would prohibit the debt collector from communicating or attempting to communicate with the consumer using that email address or telephone number. Likewise, if the consumer requests after the expiration of the opt-out period that the debt collector not communicate with the consumer by email or text message, § 1006.14(h) prohibits the debt collector from communicating or attempting to communicate with the consumer by email or text message, including by using the non-work email address or non-work telephone number specified in the § 1006.6(d)(3)(i)(B)(*1*) opt-out notice. The Bureau requests comment on proposed § 1006.6(d)(3)(i)(B)(*2*) and its related commentary.

6(d)(3)(i)(C)

A debt collector who communicates with a consumer electronically using the consumer's non-work email address or non-work telephone number recently used by the creditor or a prior debt collector may not have reason to anticipate that the communication may be read by third parties with whom the debt collector is not otherwise permitted to communicate about the debt. The Bureau has not identified data suggesting that creditors communicate with consumers at non-work email addresses or non-work telephone numbers that are generally accessible to

[246] As discussed in the section-by-section analysis of proposed § 1006.42(a)(1), that section would apply when debt collectors provide certain required disclosures in writing or electronically; it would not apply when debt collectors provide those disclosures orally.

[247] By contrast, as explained in the section-by-section analysis of proposed § 1006.6(d)(3)(i)(B), a consumer's failure to opt out of a debt collector's use of a work email address or, in the case of a text message, a work telephone number may not indicate that the consumer has assessed the risk of third-party disclosure to be low. When it comes to a debt collector's use of a non-work email address or non-work telephone number, a consumer likely possesses the information necessary to assess the risk of unwanted third-party disclosure. With respect to work email addresses and telephone numbers, however, a consumer who receives a debt collection communication may not wish to engage with a debt collector in any manner—even to opt out of further communications—using a work email address or telephone number.

[248] See the section-by-section analysis of proposed § 1006.14(h).

such individuals. Further, the Bureau believes that a consumer's decision to communicate with a creditor or a prior debt collector using a non-work email address or non-work telephone number may suggest that the consumer has assessed the risk of third-party disclosure to be low.

For these reasons, proposed § 1006.6(d)(3)(i)(C) provides that a debt collector could obtain [249] a safe harbor from liability for an unintentional third-party disclosure if the debt collector maintained procedures to reasonably confirm and document that: (1) The debt collector communicated with the consumer using a non-work email address or, in the case of a text message, a non-work telephone number that the creditor or a prior debt collector obtained from the consumer to communicate about the debt; (2) before the debt was placed with the debt collector, the creditor or the prior debt collector recently sent communications about the debt to the non-work email address or non-work telephone number; and (3) the consumer did not request the creditor or the prior debt collector to stop using the non-work email address or non-work telephone number to communicate about the debt.

Proposed § 1006.6(d)(3)(i)(C) would apply only to non-work email addresses and non-work telephone numbers. As noted above, some employers monitor work email addresses, and some employers may also monitor text messages sent to and from work telephone numbers. A consumer might agree to receive electronic communications from a creditor to a work email address or work telephone number without regard to the risk that an employer might monitor or read those communications because a consumer may not consider communications from a creditor to be as sensitive as communications from a debt collector. In other words, consumer consent to a creditor's use of a work email address or, in the case of a text message, a work telephone number might not mean that the risk of third-party disclosure is low. Therefore, procedures that permit a debt collector to communicate using a work email address or work telephone number merely because the creditor communicated using that email address or telephone number might not prevent unintentional disclosures of debt collection communications to employers.[250] Nor does the Bureau propose that a prior debt collector's use of a consumer's work email address or work telephone number would be sufficient to justify a later debt collector's use of that email address or telephone number. Even if a consumer had indicated to a prior debt collector that the risk of monitoring by an employer was low, an employer's monitoring policies and practices can change and debt collectors may differ in their approach to communications with consumers.

Proposed § 1006.6(d)(3)(i)(C) would apply only if the creditor or a prior debt collector recently used the non-work email address or non-work telephone number to send communications about the debt. The Bureau proposes this recency requirement for the same reasons that it proposes the recency requirement in § 1006.6(d)(3)(i)(A).[251]

The Bureau requests comment on proposed § 1006.6(d)(3)(i)(C), including on how often creditors communicate with consumers using non-work email addresses and, in the case of text messages, non-work telephone numbers. The Bureau also requests comment on what, if anything, a consumer's decision to communicate with a creditor or a prior debt collector using a non-work email address or non-work telephone number may suggest about the consumer's assessment of the risk of third-party disclosure. In addition, the Bureau requests comment on the third-party disclosure risks to consumers posed by the practice of reassigning telephone numbers. The Bureau also requests comment on whether the recency requirement in proposed § 1006.6(d)(3)(i)(C) adequately addresses these risks, and, if not, on how the Bureau could address them in a final rule. In addition, the Bureau requests comment on whether to apply the recency requirement to email addresses. The proposed rule does not define when a creditor's or a prior debt collector's communication about the debt would qualify as recent. The Bureau therefore also requests comment on whether and how to define recent in the context of proposed § 1006.6(d)(3)(i)(C), including on whether a communication by the creditor or a prior debt collector in the past year should qualify as recent.

6(d)(3)(ii) Additional Requirements

To fall within the safe harbor from liability that proposed § 1006.6(d)(3) would establish for unintentional violations of proposed § 1006.6(d)(1) and FDCPA section 805(b), a debt collector's procedures would not only need to include steps to reasonably confirm and document that the debt collector obtained and used an email address or, in the case of a text message, a telephone number consistent with one of the three methods identified in proposed § 1006.6(d)(3)(i), but the procedures also would need to comply with proposed § 1006.6(d)(3)(ii). Proposed § 1006.6(d)(3)(ii) would require a debt collector to take steps to prevent communications using an email address or telephone number that the debt collector knows has led to a disclosure prohibited by § 1006.6(d)(1).[252]

The Bureau proposes § 1006.6(d)(3)(ii) on the basis that a debt collector whose procedures are not designed to prevent recurrence of a known violation may intend to convey information related to the debt or its collection to a third party. The Bureau requests comment on proposed § 1006.6(d)(3)(ii), including on whether the procedures described in proposed § 1006.6(d)(3)(ii) are reasonably adapted to avoid a violation of the prohibition on third-party disclosures in proposed § 1006.6(d)(1) and FDCPA section 805(b).

6(e) Opt-Out Notice for Electronic Communications or Attempts To Communicate

The Bureau's proposal includes several provisions designed to facilitate debt collectors' use of electronic communication media, such as emails and text messages, when collecting debts. Some consumers, however, may not wish to receive electronic debt collection communications because, for example, they receive too many such communications or because such communications force them to incur charges.[253] To address this concern, proposed § 1006.6(e) would require debt

[249] To be entitled to a safe harbor, the debt collector's procedures also would need to comply with proposed § 1006.6(d)(3)(ii).

[250] The special sensitivity of debt collection communications is reflected in the law: The FDCPA regulates a debt collector's communications at the consumer's place of employment, while consumer credit origination and servicing laws, such as the Truth in Lending Act, generally do not. *See* 15 U.S.C. 1692c(a)(3).

[251] See the section-by-section analysis of proposed § 1006.6(d)(3)(i)(A).

[252] As noted above, even if a debt collector selects an email address or telephone number in accordance with the procedures in proposed § 1006.6(d)(3), the debt collector would not be permitted to communicate or attempt to communicate with a consumer using that email address or telephone number if doing so would violate another provision of the proposed rule, such as the opt-out-notice requirements of proposed § 1006.6(e).

[253] CFPB Debt Collection Consumer Survey, *supra* note 18, at 36–37 (noting that almost one-half of consumers said they would most prefer to be reached by written letter and that the second most common preference for contact was through some kind of telephone other than a work telephone).

collectors to notify consumers how to opt out of receiving electronic debt collection communications or communication attempts directed at a specific email address, telephone number for text messages, or other electronic-medium address.

The Bureau generally believes that the use of electronic media for debt collection communications can further the interests of both consumers and debt collectors. But electronic communications also pose potential consumer harms. One potential harm relates to consumer harassment. The FDCPA recognizes this harm in section 806, which prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Because communicating with consumers electronically is essentially costless, debt collectors may have little economic incentive to limit the number of such communications. As discussed in the section-by-section analysis of proposed § 1006.14(b), however, repeated or continuous debt collection communications may have the natural consequence of harassing, oppressing, or abusing the recipient. In part for this reason, the proposed rule would establish bright-line rules limiting the frequency with which a debt collector may place telephone calls in connection with the collection of a debt. However, the frequency limits in the proposed rule would not apply to emails or text messages.[254]

Another potential consumer harm relates to communication costs. The FDCPA recognizes this harm in section 808(5), which prohibits debt collectors from causing charges to be made to any person for communications by concealment of the true purpose of the communication and specifies that such charges include, but are not limited to, collect telephone calls. Although many consumers have unlimited text messaging plans, some do not.[255] Consumers without unlimited text messaging plans may incur a charge each time they receive a text message, or each time they receive a text message that exceeds a specified limit.[256] For these consumers, receiving a text message from a debt collector may be similar to accepting a collect call from a debt collector.

One way to help consumers address potentially harassing or costly electronic communications or communication attempts is to provide them with a convenient way to opt out of such communications. In pre-proposal feedback, a debt collector and several consumer advocates supported an opt-out requirement. An opt-out requirement also would be consistent with several established public policies protecting consumers who receive electronic communications.[257]

For these reasons, proposed § 1006.6(e) would require a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address to include in each such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. Proposed § 1006.6(e) also would prohibit a debt collector from requiring, directly or indirectly, that the consumer, in order to opt out, pay any fee or provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt-out. The Bureau proposes to require debt collectors to provide consumers with opt-out instructions to help ensure that a consumer who receives written electronic communications from a debt collector can, with minimal effort and cost, stop the debt collector from sending further written electronic communications or communication attempts directed at a specific address or telephone number.[258] Proposed comment 6(e)–1 would clarify that clear and conspicuous under § 1006(e) has the same meaning as in § 1006.34(b)(1) regarding validation notices and provides examples illustrating the proposed rule.

Proposed § 1006.6(e) seeks to address a group of concerns that are unique to written electronic communications and attempts to communicate. With respect to concerns about harassment from excessive communications of other types, consumers likely know how to request debt collectors to stop placing unwanted telephone calls, and proposed § 1006.14(h) would require debt collectors to honor such requests. In addition, the frequency limitations in proposed § 1006.14(b)(2) would apply to telephone calls. Moreover, debt collectors are unlikely to communicate by mail repeatedly because of the cost.[259] With respect to concerns about costs, consumers generally do not incur costs when they receive written letters, whereas some consumers do incur costs when they receive text messages. Accordingly, proposed § 1006.6(e) would not apply to non-electronic communications and attempts to

[254] See the section-by-section analysis of proposed § 1006.14(b). Proposed § 1006.14(b)(2) provides that, subject to § 1006.14(b)(3), a debt collector violates § 1006.14(b)(1) by placing a telephone call to a particular person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days, or (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt, with the date of the telephone conversation being the first day of the seven-consecutive-day period.

[255] According to one 2015 estimate, approximately 10 percent of U.S. mobile telephone numbers are not enrolled in an unlimited text plan. *See* Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting,* Instant Census Blog (Dec. 8, 2015), *https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting.*

[256] The FCC has found, for example, that unwanted calls and text messages can create substantial costs for consumers when aggregated across many contacts. *See, e.g., In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 F.C.C.Rcd. 7961, 8021 (2015) (''In addition to the invasion of consumer privacy for all wireless consumers, the record confirms that some are charged for incoming calls and messages. These costs can be substantial when they result from the large numbers of voice calls and texts autodialers can generate.''), *set aside in part by ACA Int'l* v. *Fed. Commc'ns Comm'n,* 885 F.3d 687 (D.C. Cir. 2018).

[257] For example, with respect to emails, the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN–SPAM) Act reflects a public policy in favor of providing consumers with a specific mechanism to opt out of certain email messages. *See* 15 U.S.C. 7704(a)(3) (requiring that commercial emails include a functioning return email address or other internet-based mechanism, clearly and conspicuously displayed, for the recipient to request not to receive future email messages from the sender at the address where the message was received); Fed. Trade Comm'n, *CAN–SPAM Act: A Compliance Guide for Business* (Sept. 2009), *https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business* (explaining that messages covered by the CAN–SPAM Act ''must include a clear and conspicuous explanation of how the recipient can opt out of getting email from [the sender] in the future''). In addition, the FTC's regulations implementing the CAN–SPAM Act prohibit charging a fee or imposing other requirements on recipients who wish to opt out of certain email communications. 16 CFR 316.5; *see also* Definitions & Implementation Under the CAN–SPAM Act, 73 FR 29654, 29675 (May 21, 2008) (concluding that, to implement an unsubscribe function, requests for personal information are unnecessary).

[258] For ease of reference, throughout the section-by-section analysis of proposed § 1006.6(e), the Bureau uses the phrase ''written electronic communications'' to refer to emails, text messages, and other electronic communications that are readable. The Bureau's use of this phrase has no bearing on the Bureau's interpretation of the terms ''written'' or ''in writing'' under any law or regulation, including the FDCPA or the E-SIGN Act.

[259] *See, e.g.,* 15 U.S.C. 7701(a)(1) (noting Congressional finding, in connection with CAN–SPAM Act, that the ''low cost'' of email makes it ''extremely convenient and efficient''); Arthur Middleton Hughes, *Why Email Marketing is King,* Harv. Bus. Rev. (Aug. 21, 2012), *https://hbr.org/2012/08/why-email-marketing-is-king* (''Direct mail costs more than $600 per thousand pieces. With email, there are almost no costs at all.'').

communicate with a consumer, such as letters. Nor would it apply to telephone calls.

While emails and text messages are common forms of written electronic communications today, technology likely will evolve to introduce newer forms of written electronic communications. Proposed § 1006.6(e) would apply to all written electronic communications, regardless of whether they are specified in the rule and regardless of whether they exist now or come to exist in the future. For example, direct messaging communications on social media and communications in an application on a private website, mobile telephone, or computer, would be covered by proposed § 1006.6(e).

In its Small Business Review Panel Outline, the Bureau described a proposal under consideration to require debt collectors, absent consumer consent, to use free-to-end-user (FTEU) text messages so that the debt collector, rather than the consumer, would incur any charge for the message.[260] On balance, however, requiring FTEU technology may be too restrictive. FTEU technology may only be supported by certain wireless platforms, and industry standards may only permit its use with affirmative consumer consent.[261] Requiring debt collectors to use FTEU technology could therefore disadvantage some consumers by preventing them from receiving text messages, even when text messages are an equal or preferred medium of communication.

The Bureau requests comment on proposed § 1006.6(e) and its related commentary, including on the costs to debt collectors and benefits to consumers. In addition, the Bureau requests comment on the potential consumer harms posed by written electronic communications, including the proportion of consumers in debt collection that do not maintain unlimited text messaging plans and the cost to such consumers of receiving text messages. The Bureau also requests comment on whether consumers are likely to find it harassing, oppressive, or abusive to receive written electronic communications, such as emails and text messages, without having a simple mechanism to make them stop, and the costs consumers incur when trying to unsubscribe from written electronic communications that do not contain an unsubscribe option. In addition, the Bureau requests comment on whether to identify a non-exclusive list of words or phrases that express an opt-out instruction. In pre-proposal outreach, for example, one consumer advocate urged that debt collectors be required to honor standard phrases, such as ''stop,'' ''unsubscribe,'' ''end,'' ''quit,'' and ''cancel.'' The Bureau also requests comment on whether to specify the period within which a debt collector must process a consumer's request to opt out pursuant to proposed § 1006.6(e), and, if so, what that period should be.

The Bureau proposes § 1006.6(e) as an interpretation of FDCPA section 806 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. FDCPA section 806 prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. It is essentially costless for debt collectors to send written electronic communications, such as emails and text messages, to consumers. Debt collectors may therefore have little economic incentive to limit the number of such communications. Individual consumers may find it harassing, oppressive, or abusive to receive written electronic communications, such as emails and text messages, without having a simple mechanism to make them stop. The Bureau proposes § 1006.6(e) to provide consumers with a way to stop written electronic communications that they find harassing, oppressive, or abusive.

The Bureau also proposes § 1006.6(e) as an interpretation of FDCPA section 808 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. FDCPA section 808 prohibits the use of unfair or unconscionable means to collect or attempt to collect any debt. It may be unfair or unconscionable for a debt collector to send a consumer a written electronic communication, such as an email or text message, without providing an unsubscribe option. Because written electronic communications, such as emails and text messages, are essentially costless for debt collectors, failing to provide consumers with an unsubscribe option may lead to excessive written electronic communications. In the absence of a convenient unsubscribe option, a consumer who wishes to unsubscribe from written electronic communications may incur time and cost doing so. The process may require the consumer to write an unsubscribe request, search for and identify the debt collector (an entity with whom the consumer may not be familiar), obtain contact information for the debt collector, and follow up with the debt collector if necessary. On balance, these costs to consumers do not appear to outweigh the benefit to debt collectors of omitting an unsubscribe option from written electronic communications. Further, FDCPA section 808(5) specifically prohibits debt collectors from causing charges to be incurred through the concealment of the true purpose of a communication, and it specifies that such charges include collect telephone calls. A debt collector who sends a text message to a consumer who lacks an unlimited text messaging plan may—similar to a debt collector who places a collect call to a consumer while concealing the purpose of the call—cause the consumer to incur communications charges that the consumer does not wish to incur. The Bureau proposes § 1006.6(e) to limit written electronic communications that cause consumers to incur such charges.

The Bureau also proposes § 1006.6(e) pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances. A consumer's ability to opt out of written electronic communications from a debt collector is a feature of debt collection, and the opt-out instructions required by proposed § 1006.6(e) disclose that feature to consumers.

Section 1006.10 Acquisition of Location Information

FDCPA section 804 imposes certain requirements and limitations on a debt collector who communicates with any person other than the consumer for the purpose of acquiring location information about the consumer.[262] FDCPA section 803(7) defines the term location information.[263] The Bureau understands that there may be some uncertainty regarding aspects of these provisions, such as how to determine whether a debt collector who has acquired some information about a

[260] Small Business Review Panel Outline, *supra* note 56, at appendix H at 1.

[261] According to one industry website, FTEU is supported by six carriers (AT&T, Boost, Sprint, T-Mobile, Verizon Wireless, and Virgin Mobile). iVision Mobile, *Free to End User (FTEU), http://www.ivisionmobile.com/text-messaging-software/free-to-end-user-fteu.asp* (last visited May 6, 2019); Mobile Mkt'g Ass'n, *U.S. Consumer Best Practices for Messaging: Version 7.0,* at 43 (Oct. 16, 2012), *https://www.mmaglobal.com/files/bestpractices.pdf* (describing FTEU ''Cross Carrier Guidelines'' as providing that ''[c]ontent providers must obtain opt-in approval from subscribers before sending them any SMS or MMS messages or other content from a short code'').

[262] 15 U.S.C. 1692c.

[263] 15 U.S.C. 1692a(7).

consumer's whereabouts no longer has the purpose of acquiring location information when communicating with a person other than the consumer. Such uncertainty may relate at least in part to broader issues regarding the information debt collectors receive from creditors. The Bureau will continue to consider these and other issues related to location information communications to identify areas that pose a risk of consumer harm or require clarification.

Accordingly, proposed § 1006.10 would implement FDCPA sections 803(7) and 804 and generally mirrors the statute, with minor wording and organizational changes for clarity.[264] Proposed 1006.10(c), however, would clarify that a debt collector who is subject to the frequency restrictions in FDCPA section 804 also must comply with the frequency restrictions in proposed 1006.14(b)—that is, the proposal's limits on telephone calls also apply to location calls. The Bureau proposes § 1006.10 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

The Bureau also proposes two comments clarifying what is location information in the decedent debt context. Proposed comment 10(a)–1 would clarify the definition of location information in the decedent debt context by providing that, if a consumer obligated or allegedly obligated to pay any debt is deceased, location information includes the information described in proposed § 1006.10(a) for a person who is authorized to act on behalf of the deceased consumer's estate. The Bureau proposes this comment on the basis that, as discussed in the section-by-section analysis of proposed § 1006.2(e) (definition of consumer), the term consumer under the FDCPA includes deceased consumers. A debt collector may obtain location information for such consumers by obtaining location information for the person with the authority to act on behalf of the deceased consumer's estate. Proposed comment 10(a)–1 would enable debt collectors who are trying to collect a deceased consumer's debts to locate a person with the authority to act on behalf of the deceased consumer's estate, thereby facilitating the prompt resolution of estates.

Proposed comment 10(b)(2)–1 would interpret FDCPA section 804(2) in the decedent debt context. Proposed comment 10(b)(2)–1 explains that, if the consumer obligated or allegedly obligated to pay the debt is deceased, and the debt collector is attempting to locate a person with the authority to act on behalf of the deceased consumer's estate, the debt collector does not violate § 1006.10(b)(2) by stating that the debt collector is seeking to identify and locate a person who is authorized to act on behalf of the deceased consumer's estate.

In its Policy Statement on Decedent Debt, the FTC stated that it would refrain from taking enforcement action under FDCPA section 804(2) against debt collectors who state that they are seeking to locate a person ''with the authority to pay any outstanding bills of the decedent out of the decedent's estate.'' [265] FDCPA section 804(2) prohibits debt collectors communicating with third parties from stating that the consumer owes any debt. The FTC believed that, unlike the word ''debts,'' a reference to ''outstanding bills'' would be unlikely to reveal information about whether the deceased consumer was delinquent on those bills because nearly all consumers leave some bills at the time of their death.[266] The Bureau is concerned that even references to ''outstanding bills'' may convey that the consumer owes a debt because the definition of ''debt'' in FDCPA section 803(5) broadly includes ''any obligation or alleged obligation of a consumer to pay money arising out of a transaction . . . primarily for personal, family, or household purposes.'' Accordingly, the Bureau proposes to limit debt collectors to asking for information about a person authorized to act on behalf of the deceased consumer's estate. However, the FTC's phrase ''with the authority to pay any outstanding bills of the decedent out of the decedent's estate'' may be more understandable than the Bureau's proposed phrase ''who is authorized to act on behalf of the deceased consumer's estate.'' The Bureau requests comment on proposed comment 10(b)(2)–1, including on any experiences with the language contained in the FTC's Policy Statement on Decedent Debt and on whether the rule should follow the FTC's approach.

Section 1006.14 Harassing, Oppressive, or Abusive Conduct

FDCPA section 806 prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.[267] It lists six non-exhaustive examples of such prohibited conduct. Proposed § 1006.14 would implement and interpret FDCPA section 806. Except with respect to proposed § 1006.14(b) and (h), proposed § 1006.14 generally restates the statute, with only minor wording and organizational changes for clarity. Paragraph (a) and paragraphs (c) through (g) of proposed § 1006.14 are not addressed further in the section-by-section analysis below.[268]

14(b) Repeated or Continuous Telephone Calls or Telephone Conversations

FDCPA section 806 generally prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. FDCPA section 806(5) describes one example of conduct prohibited by section 806: Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.[269] Proposed § 1006.14(b)(1) through (5) would implement and interpret FDCPA section 806(5)—and, by extension, FDCPA section 806 [270]—by restating the language of section 806(5), with one clarification, and by proposing numerical limits on the frequency with which a debt collector may place telephone calls to a person. The proposed frequency limits include certain exceptions and would establish whether a debt collector has violated or has complied with FDCPA section 806(5).

For debt collectors collecting a consumer financial product or service debt, as defined in proposed § 1006.2(f), proposed § 1006.14(b)(1) through (5) also would identify an unfair act or practice under section 1031(b) of the Dodd-Frank Act and would prescribe requirements for the purpose of preventing covered persons from engaging in that unfair act or

[264] For example, while no change in meaning is intended, the proposal substitutes the phrase ''by mail'' for the phrase ''effected by the mails or telegram'' in FDCPA section 804(5) to avoid obsolete language.

[265] FTC Policy Statement on Decedent Debt, *supra* note 192, at 44918–23.

[266] *Id.* at 44921 n.56.

[267] 15 U.S.C. 1692d.

[268] Proposed § 1006.14(a) would implement FDCPA section 806's general prohibition against conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Proposed § 1006.14(c) through (g) would implement FDCPA section 806(1) through (4) and (6) (15 U.S.C. 1692d(1)–(4), (6)).

[269] 15 U.S.C. 1692d(5).

[270] Because the conduct described in FDCPA section 806(5) merely illustrates conduct that section 806 prohibits, proposed § 1006.14(b)(1) through (5) necessarily implements and interprets both FDCPA section 806 and 806(5). For efficiency, the section-by-section analysis of proposed § 1006.14(b)(1) through (5) focuses primarily on interpreting the language of FDCPA section 806(5).

practice.[271] Although FDCPA section 806 and 806(5) and section 1031(b) of the Dodd-Frank Act define the conduct they proscribe differently, in the interest of brevity, the discussion below generally uses the catchalls ''harass'' and ''harassment'' to refer to the conduct addressed by proposed § 1006.14(b)(1) through (5).

The Bureau proposes § 1006.14(b)(1) through (5) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, as well as its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules to identify and prevent unfair acts or practices in connection with the collection of a consumer financial product or service debt, as that term is defined in proposed § 1006.2(f).

14(b)(1) In General

14(b)(1)(i) FDCPA Prohibition

FDCPA section 806(5) prohibits a debt collector from ''causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.'' Since the FDCPA's 1977 enactment, telephone-calling technology has evolved, and changes in technology may create uncertainty about whether a debt collector has ''caus[ed] a telephone to ring.'' It now is common to place a telephone call and be connected to the dialed number without ever causing a traditional, audible ring. For example, many telephones afford users the option to have their telephones ring in the form of vibrating, visual, or customized audio alerts. In addition, many callers, including many debt collectors, now can bypass a person's opportunity to answer the telephone by connecting directly to the person's voicemail. As a result, debt collectors can place telephone calls or leave voicemail messages for a person without ever causing a traditional, audible ring. Such telephone calls, if made repeatedly and continuously, nonetheless may be intended to harass or may have the effect of harassing a person in ways that the FDCPA prohibits. For that reason, even if a debt collector's telephone call may not cause a traditional ring, the Bureau's proposal treats the call as within the scope of FDCPA section 806(5), or in any event within the scope of FDCPA section 806, if the call is connected to the dialed number. Accordingly, the Bureau proposes to interpret the prohibitions in FDCPA section 806 and 806(5) as applying when a debt collector ''places'' a telephone call.[272]

For these reasons, and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, as well as pursuant to its authority to implement and interpret FDCPA section 806 and 806(5), the Bureau proposes to provide in § 1006.14(b)(1)(i) that, in connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

The Bureau proposes comment 14(b)(1)–1 to clarify that placing a telephone call includes placing a telephone call that results in a ringless voicemail (or ''voicemail drop'') but does not include sending an electronic message (*e.g.,* a text message or an email) to a mobile telephone.[273] The Bureau proposes this clarification because, given the specific language of FDCPA section 806(5), the Bureau believes that Congress may have intended for this provision to apply to communications that present the opportunity for the parties to engage in a live telephone conversation or that result in an audio message. In addition, as discussed in the section-by-section analysis of proposed § 1006.14(b)(2), the Bureau understands that few debt collectors contact consumers using such electronic messages and, as a result, that debt collectors have not been sending electronic messages to consumers repeatedly or continuously with intent to harass them or to cause substantial injury. The Bureau requests comment on proposed § 1006.14(b)(1)(i) and on comment 14(b)(1)–1.

The Bureau also requests comment on whether to interpret FDCPA section 806 and 806(5) as prohibiting debt collectors from using communication media other than telephone calls frequently and repeatedly with intent to annoy, abuse, or harass any person in connection with the collection of any debt. For example, the Bureau considered proposing a broader version of proposed § 1006.14(b)(1)(i) that would have prohibited repeated or continuous attempts to contact a person by other media, such as by sending letters, emails, or text messages. Under such an approach, contacts by such other media also could be subject to a bright-line frequency limit, similar to the structure for telephone calls in proposed § 1006.14(b)(2). The Bureau does not propose subjecting communication media other than telephone calls to the prohibitions on repeated or continuous contacts (or to bright-line limits on the number of permissible contacts per week) primarily because the Bureau is not aware of evidence demonstrating that debt collectors commonly harass consumers or others through repeated or continuous debt collection contacts by media other than telephone calls.

As to mail, the Bureau has received few complaints about debt collectors sending excessive letters; in fact, available evidence suggests that a significant percentage of consumers prefer to communicate with debt collectors by mail.[274] In addition, in feedback to the Bureau after publication of the Small Business Review Panel Outline, industry stakeholders and consumer advocates agreed that there currently is not evidence of a need to regulate the frequency with which debt collectors communicate with consumers or others by mail. The cost of sending mail—currently about $0.50 to $0.80 cents to print and mail a letter, as noted in part VI—is significantly greater than the cost of making telephone calls and may deter debt collectors from sending excessive communications by mail.[275]

As to email and text messages, debt collectors generally have not yet begun communicating with consumers using these or other newer communication media.[276] The Bureau thus is unaware of evidence, including from consumer complaints or feedback from industry stakeholders or consumer advocates, demonstrating that debt collectors commonly use such media to contact consumers repeatedly or continuously with intent to harass or with the effect of harassing them. Indeed, both industry

[271] Dodd-Frank Act section 1031 applies to covered persons and service providers. Debt collectors collecting consumer financial product or service debt are covered persons. 12 U.S.C. 5481(5), (6), (15)(A)(x).

[272] As explained in the section-by-section analysis of proposed § 1006.14(b)(3)(iii), the proposed rule also provides that a debt collector's telephone calls that are unable to connect to the dialed number do not count toward, and are permitted in excess of, the frequency limits in proposed § 1006.14(b)(2).

[273] Proposed comment 14(b)(1)–1 also would clarify that the same interpretation of ''placing a telephone call'' applies with respect to proposed § 1006.14(b)(1)(ii).

[274] Forty-two percent of respondents to the Bureau's Debt Collection Consumer Survey who had been contacted about a debt in the prior year identified mail as their preferred medium of communication for debt collection. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 37.

[275] The Bureau notes that the Commonwealth of Massachusetts's debt collection regulations, which include communication frequency limits for debt collectors and creditors, exclude postal mail from those limits. *See* 209 Code. Mass. Regs 18.14(1)(d); 940 Code Mass. Regs. 7.04(1)(f) (frequency limits apply to telephone calls and text messages).

[276] See generally the section-by-section analysis of proposed § 1006.6(d)(3).

stakeholders and consumer advocates have suggested that such media may be inherently less harassing than telephone calls because, for example, recipients may have more freedom to decide when to engage with an email or a text message than with a debt collection telephone call.[277] Although the Bureau currently is unaware of sufficient evidence of consumer injury that would suggest a need for restricting the frequency of email and text message communications, the Bureau recognizes that the use of such media, if abused, could harass consumers in some of the same ways as repeated or continuous telephone calls or telephone conversations.[278] The Bureau notes that proposed § 1006.14(a)—which generally prohibits any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt—would apply to harassment through media other than telephone calls and could provide sufficient protection to consumers. The Bureau requests comment on the proposed approach, including on whether the frequency limits should apply to communication media other than telephone calls and, if so, to which media.[279]

During the SBREFA process, the Bureau's proposal under consideration to establish numerical limits on the frequency with which debt collectors communicate and attempt to communicate with consumers and others would have applied to all forms of communication media, not just to telephone calls. Several small entity representatives suggested that, in their experience, consumers increasingly prefer communicating by email, and that excluding email from any frequency limits would encourage debt collectors to use email instead of potentially more harassing communication strategies, such as placing repeated telephone calls. One small entity representative advised that using email to contact consumers allowed it to greatly reduce its number of outbound telephone calls, resulting in fewer consumer complaints and enabling it to monitor communications for compliance with the FDCPA more easily. In addition, small entity representatives suggested that written correspondence (*e.g.,* mailed letters) should be excluded from any frequency limits. The Small Business Review Panel therefore recommended that the Bureau consider whether the frequency limits should apply equally to all communication channels.[280] Limiting proposed § 1006.14(b)(1)(i) and (2) to a prohibition against repeated and continuous telephone calls should address small entity representatives' concerns about a frequency limit that would apply to all types of communication media.

14(b)(1)(ii) Identification and Prevention of Dodd-Frank Act Unfair Act or Practice

The Bureau proposes § 1006.14(b)(1)(ii) to identify that a debt collector who is engaged in the collection of a consumer financial product or service debt, as that term is defined in proposed § 1006.2(f), engages in an unfair act or practice by placing telephone calls or engaging any person in telephone conversation repeatedly or continuously, such that the natural consequence is to harass, oppress, or abuse any person at the called number. The Bureau proposes § 1006.14(b)(1)(ii) on the basis that such conduct by debt collectors is an unfair act or practice as described in Dodd-Frank Act section 1031(c) because, as discussed in the section-by-section analysis of proposed § 1006.14(b)(2) below,[281] the conduct causes or is likely to cause substantial injury to consumers that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or to competition.[282] The Bureau also proposes § 1006.14(b)(1)(ii) to provide requirements to prevent such an unfair act or practice; specifically, under the proposal, a debt collector engaged in the collection of a consumer financial product or service debt must not exceed the calling frequency limits proposed in § 1006.14(b)(2). The Bureau proposes § 1006.14(b)(1)(ii) pursuant to its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules to identify and prevent unfair acts or practices in connection with the collection of a consumer financial product or service debt, as that term is defined in proposed § 1006.2(f).

14(b)(2) Frequency Limits

Proposed § 1006.14(b)(2) sets forth bright-line frequency limits for debt collection telephone calls. This section-by-section analysis discusses the Bureau's proposal to establish bright-line frequency limits generally; the section-by-section analysis of proposed § 1006.14(b)(2)(i) and (ii) addresses the specific numerical frequency limits that the Bureau proposes.

As noted, FDCPA section 806 prohibits a broad range of debt collection communication practices that harm consumers and others, and section 806(5) in particular prohibits debt collectors from making telephone calls or engaging a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass. Section 806(5) does not identify a specific number of telephone calls or telephone conversations within any particular timeframe that would violate the statute. In the years since the FDCPA was enacted, courts interpreting FDCPA section 806(5) have not developed a consensus or bright-line rule regarding call frequency.[283] While several States and localities have imposed numerical limits on debt collection contacts, the limits vary, and the large majority of jurisdictions have not established any numerical limits.[284]

Also in the years since the FDCPA was enacted, technological developments have intensified the

[277] As with mail, the Bureau notes that Massachusetts's debt collection regulations do not limit the frequency of a debt collector's email communications. See *supra* note 275.

[278] *Cf. Clements* v. *HSBC Auto Fin., Inc.,* Civ. A. No. 5:09–cv–0086, 2011 WL 2976558, at *5 (S.D. W. Va. July 21, 2011) (''That Plaintiffs were not at home all of the time and, therefore, could not have heard each one of the calls is of little moment. They had notice of every missed call through Caller ID. . . . Missed calls communicate more than a phone number. They can, depending on volume and frequency, communicate urgency and panic.'').

[279] The Bureau notes in particular that the FCC has interpreted a statutory reference to ''mak[ing] any call'' as encompassing the sending of text messages. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 18 FCC Rcd. 14,014, 14,115 ¶ 165 (2003).

[280] Small Business Review Panel Report, *supra* note 57, at 37.

[281] Section 1006.14(b)(2) proposes bright-line frequency limits that would determine whether a debt collector has violated § 1006.14(b)(1).

[282] Section 1031(c) of the Dodd-Frank Act defines unfairness without regard to a covered person's or service provider's intent. For FDCPA-covered debt collectors who are collecting a consumer financial produce or service debt, the Bureau's proposal therefore identifies the unfair act or practice as repeated or continuous telephone calls that have the natural consequence of harassment, oppression, or abuse, without regard to the debt collector's intent.

[283] *See, e.g., Turner* v. *Prof'l Recovery Servs., Inc.,* 956 F. Supp. 2d 573, 578 (D.N.J. 2013) (noting the lack of consensus or bright-line rule); *Neu* v. *Genpact Servs., LLC,* No. 11–CV–2246 W KSC, 2013 WL 1773822, at *4 (S.D. Cal. Apr. 25, 2013) (same); *Hicks* v. *Am.'s Recovery Sols., LLC,* 816 F. Supp. 2d 509, 515 (N.D. Ohio 2011) (same).

[284] For example, the Commonwealth of Massachusetts and City of New York generally limit debt collectors to initiating two communications per week with a consumer. *See* 209 Code. Mass. Regs 18.14(1)(d) (limiting contacts by debt collectors); 940 Code Mass. Regs. 7.04(1)(f) (limiting contacts by creditors engaged in debt collection); N.Y.C. Admin. Code 5–77(b)(1)(iv) (limiting contacts by debt collectors). The State of Washington generally limits debt collectors to three total communications and one workplace communication per week with a consumer. *See* Wash. Rev. Code 19.16.250(13)(a), (b). The States of New Hampshire and Oregon limit the frequency of workplace communications. *See* N.H. Rev. Stat. Ann. 358–C:3(I)(c); Or. Rev. Stat. 646.639(2)(g).

consumer-protection concerns underlying FDCPA section 806(5). In 1977, placing a telephone call was typically a manual process that required a caller to dial a telephone number one digit at a time. Since then, the development of ''predictive dialers'' has enabled callers, such as debt collectors, to load a large number of telephone numbers into a program that automatically dials the numbers and, if the call is answered, connects the call to a debt collector. Predictive dialers have substantially reduced the cost to debt collectors of placing telephone calls and have enabled debt collectors to place many more calls at a very low cost.[285]

In light of these developments, and in the absence of a bright-line rule about how many telephone calls is too many, numerous problems with call frequency persist. Frequent telephone calls are a consistent source of consumer-initiated litigation and consumer complaints to Federal and State regulators. Consumers' lawsuits allege injuries such as feeling harassed, stressed, intimidated, or threatened, and sometimes allege adverse impacts on employment.[286] In addition, from 2011 through 2018, the Bureau and the FTC received over 100,000 complaints about repeated debt collection telephone calls.[287] Some consumers submit narrative descriptions along with their complaints to the Bureau, providing a window into their experiences with repeated telephone calls. Some consumers describe being called multiple times per day, every day of the week, for weeks or months at a time.[288] Some consumers report that repeated calls make them feel upset, stressed, intimidated, hounded, or weary, or that such calls interfere with their health or sleep or—when debt collection voicemails fill their inboxes—their ability to receive other important messages.[289]

When Congress conferred FDCPA rulemaking authority on the Bureau through the Dodd-Frank Act in 2010, it relied, in part, on consumers' experiences with repeated or continuous debt collection telephone calls to observe that case-by-case enforcement of the FDCPA had not ended the consumer harms that the statute was designed to address. In a 2010 report prepared in connection with the Restoring American Financial Stability Act of 2010 (the Senate's predecessor bill to the Dodd-Frank Act), the Senate Committee on Banking, Housing, and Urban Affairs cited consumer complaints to the FTC about, among other things, debt collectors ''bombarding [them] with continuous calls'' to conclude that abusive debt collection practices had continued to proliferate since the FDCPA's passage.[290] In connection with that finding, among others, Congress granted the Bureau the authority to prescribe rules with respect to the activities of FDCPA-covered debt collectors, as well as to issue regulations to prevent and prohibit persons covered under the Dodd-Frank Act from engaging in unfair, deceptive, or abusive acts or practices.[291]

Consumers' experiences with, and complaints about, repeated or continuous debt collection telephone calls do not necessarily establish that the conduct in each instance would have violated FDCPA section 806(5). They do, however, suggest a widespread consumer protection problem that has persisted for 40 years notwithstanding the FDCPA's existing prohibitions and case-by-case enforcement by the FTC and the Bureau as well as private FDCPA actions.[292] To address this persistent harm, the Bureau proposes § 1006.14(b)(2) to establish bright-line rules for determining whether a debt collector has violated FDCPA section 806(5) (and, in turn, FDCPA section 806), as implemented and interpreted in proposed § 1006.14(b)(1).

Proposed § 1006.14(b)(2) provides that, subject to § 1006.14(b)(3), a debt collector violates proposed § 1006.14(b)(1) by placing a telephone call to a particular person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days, or (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt, with the date of

[285] *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 30 F.C.C. Rcd. 7961, 8021 (2015) (''Autodialers can quickly dial thousands of numbers, a function that costs large numbers of wireless consumers money and aggravation.''), *set aside in part by ACA Int'l* v. *Fed. Commc'ns Comm'n,* 885 F.3d 687 (D.C. Cir. 2018).

[286] *See, e.g., Meadows* v. *Franklin Collection Serv., Inc.,* 414 F. App'x 230, 233–34 (11th Cir. 2011) (reversing district court's dismissal of consumer's FDCPA section 806(5) claim where ''[plaintiff] testified that [the debt collector's] phone calls eventually made her feel harassed, stressed, upset, aggravated, inconvenienced, frustrated, shaken up, intimidated, and threatened on occasion. And, several times the calls woke her up from sleep and caused her difficulty sleeping.''); *Roots* v. *Am. Marine Liquidators, Inc.,* No. 0:12–CV–00602–JFA, 2012 WL 3136462, at *1–2 (D.S.C. Aug. 1, 2012) (awarding damages to consumer where, among other things, ''[p]laintiff testified that after his manager learned that Plaintiff was getting repeated collection calls at work, they treated him differently which caused him to seek out other employment. Plaintiff took a new job in April, 2012, which resulted in a pay reduction of $2.00 per hour for a period of 52 weeks. He works 40 hours each week, for a total loss of income in the amount of $ 4,160.'').

[287] *See* 2019 FDCPA Annual Report, *supra* note 11, at 15–17; 2018 FDCPA Annual Report, *supra* note 16, at 14–16; 2017 FDCPA Annual Report, *supra* note 21, at 15–17; Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2016,* at 18–19 (Mar. 2016), *https://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf*; Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2015,* at 12–14 (Mar. 2015), *https://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf*; Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2014,* at 11–13, 19 (Mar. 2014), *https://files.consumerfinance.gov/f/201403_cfpb_fair-debt-collection-practices-act.pdf*; 2013 FDCPA Annual Report, *supra* note 9, at 17; Bureau of Consumer Fin. Prot., *Fair Debt Collection Practices Act: CFPB Annual Report 2012,* at 8 (Mar. 2012), *https://files.consumerfinance.gov/f/201203_cfpb_FDCPA_annual_report.pdf.* This total reflects complaints about all persons collecting debt, including creditors and other first-party collectors in addition to debt collectors covered by the FDCPA. For complaints submitted to the Bureau, complaint data reflects the number of complaints that consumers self-identified as being primarily about frequent or repeated debt collection communications (consumers must choose only one topic when filing their complaints). The Bureau has not attempted to identify the specific number of communications-related consumer complaints that it has received because many complaints that consumers self-identify as being primarily about a different issue also may include concerns about a debt collector's communication practices.

[288] *See generally* Bureau of Consumer Fin. Prot., *Consumer Complaints, https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp* (last visited May 6, 2019).

[289] *Id.*

[290] S. Rept. 111–176, at 19 (2010).

[291] 15 U.S.C. 1692*l;* Dodd-Frank Act sections 1031(b), 1032; 12 U.S.C. 5531(b), 5532 (2010).

[292] *See, e.g.,* Complaint at ¶¶ 63, 124–28, *Fed. Trade Comm'n & Consumer Fin. Prot. Bureau* v. *Green Tree Servicing LLC,* No. 0:15–cv–02064 (D. Minn. Apr. 21, 2015), *https://www.ftc.gov/enforcement/cases-proceedings/112-3008/green-tree-servicing-llc* (alleging that defendant violated FDCPA section 806(5) by, among other things, having frequently called consumers between seven and 20 times per day, every day, week after week); Complaint at ¶¶ 20–22, 41, *Fed. Trade Comm'n* v. *K.I.P., LLC,* No. 1:15–cv–02985 (N.D. Ill. Apr. 6, 2015), *https://www.ftc.gov/enforcement/cases-proceedings/152-3048/kip-llc-payday-loan-recovery-group* (alleging that defendant violated FDCPA section 806(5) by, among other things, ''call[ing] consumer multiple times per day or night . . . over an extended period of time''); Complaint at ¶¶ 22, 50–53, *Fed. Trade Comm'n* v. *Expert Glob. Sols, Inc.,* No. 3–13 CV 2611–M (N.D. Tex. July 8, 2013), *https://www.ftc.gov/enforcement/cases-proceedings/1023201/expert-global-solutions-inc-nco-group-inc* (alleging that defendants violated FDCPA section 806(5) by, among other things, ''call[ing] multiple times per day or frequently over an extended period of time [including,] for example, calling some persons three or more time per day''); Complaint at ¶¶ 80, 97(b), *Fed Trade Comm'n* v. *Jefferson Capital Sys., LLC,* No. 1:08–cv–1976 BBM (N.D. Ga. June 10, 2008), *https://www.ftc.gov/enforcement/cases-proceedings/062-3212/compucredit-corporation-jefferson-capital-systems-llc* (alleging that defendant violated FDCPA section 806(5) by, among other things, ''[calling] individual consumers in excess of twenty times per day, in some cases, at intervals of only twenty to thirty minutes'').

the telephone conversation being the first day of the seven-consecutive-day period.[293] As discussed in the section-by-section analysis of proposed § 1006.14(b)(2)(i) and (ii), which addresses the specific frequency limits that the Bureau proposes, the Bureau proposes § 1006.14(b)(2) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, its authority to implement and interpret FDCPA section 806 and 806(5), and its authority under Dodd-Frank Act section 1031(b) to prescribe rules to prevent Bureau-identified unfair acts or practices in connection with any transaction with a consumer for a consumer financial product or service.

Proposed § 1006.14(b)(2) would apply not only to debt collection calls placed to consumers who owe or are alleged to owe debt, but to any person (with certain exceptions described below). Congress recognized the potential harm from debt collectors placing repeated or continuous telephone calls to persons other than consumers when it enacted FDCPA section 806(5), which protects ''any person'' from repeated or continuous telephone calls or conversations made with intent to annoy, abuse, or harass. Likewise, Dodd-Frank Act section 1031 applies to acts or practices ''in connection with a transaction with a consumer for a consumer financial product or service'' (or ''the offering of a consumer financial product or service''), provided that ''the act or practice causes or is likely to cause substantial injury to consumers'' and meets the other criteria for unfairness. Like the language of FDCPA section 806(5), the language of Dodd-Frank Act section 1031 suggests that an act or practice may be unfair to consumers generally, presumably even if the injury is to a consumer who is not a party to the transaction creating the debt, so long as the injury is ''in connection with'' a transaction with a consumer for a consumer financial product or service. The frequency limits in proposed § 1006.14(b)(2) thus would apply to any person (with certain exceptions described below), not only to the consumer who is alleged to owe the debt.[294]

The Bureau requests comment on the proposal to establish a bright-line rule to determine when a debt collector's calling frequency has violated FDCPA section 806(5) and the prohibition in proposed § 1006.14(b)(1)(i), as well as to prevent an unfair act or practice under Dodd-Frank Act section 1031(b). As discussed, under such a bright-line rule, a debt collector who exceeds the frequency limits would per se violate FDCPA section 806(5) and the prohibitions in proposed § 1006.14(b)(1), while a debt collector who stays within the frequency limits would per se comply with those provisions. In lieu of a bright-line rule, it would be possible, for example, to have a rebuttable-presumption rule. Under a rebuttable presumption, a debt collector who exceeded the frequency limits presumptively would violate FDCPA section 806(5) and the prohibitions in proposed § 1006.14(b)(1), but the debt collector would have the opportunity to rebut that presumption.

As discussed further in the section-by-section analysis of proposed § 1006.14(b)(4) below, the Bureau does not propose a rebuttable presumption because the benefits of a rebuttable presumption approach are unclear. It appears that most, if not all, of the circumstances that might require a debt collector to exceed the frequency limits could be addressed by specific exceptions to a bright-line rule.[295] It thus appears that a well-defined, bright-line rule with specific exceptions could provide needed flexibility without sacrificing the clarity of a bright-line rule. A bright-line rule may also promote predictability and reduce the risk and uncertainty of litigation. The Bureau requests comment on this aspect of the proposal and on whether, if a rebuttable presumption approach were adopted, the Bureau should retain any of the exceptions described in proposed § 1006.14(b)(3).

During the SBREFA process, the Bureau's proposal under consideration would have applied to any of a debt collector's communications or attempts to communicate. The Bureau's Small Business Review Panel Outline noted that a bright-line rule could provide exceptions for certain types of contacts, but the Outline did not identify any particular exceptions that were under consideration.[296] Small entity representatives suggested that contacts initiated by consumers should not count toward the frequency limits, and the Small Business Review Panel Report recommended that the Bureau consider whether consumer-initiated contacts should be excluded.[297] Proposed § 1006.14(b)(2) would count only telephone calls that a debt collector ''places'' to a person toward the frequency limits, which may help to address small entity representatives' concerns about consumer-initiated contacts.

14(b)(2)(i)

Proposed § 1006.14(b)(2)(i) provides that, subject to the exceptions in § 1006.14(b)(3), a debt collector violates § 1006.14(b)(1)(i) by placing a telephone call to a person more than seven times within seven consecutive days in connection with the collection of a particular debt. Under this bright-line rule, and subject to the exceptions in proposed § 1006.14(b)(3), a debt collector who places more than seven telephone calls to any person within seven consecutive days about a debt would per se violate FDCPA section 806 and 806(5) and the prohibitions in proposed § 1006.14(b)(1).[298]

The Bureau's proposed frequency limits take into account a number of competing considerations. One consideration is that, for many—perhaps most—people, even a small number of debt collection telephone calls may have the natural consequence of causing them to experience harassment, oppression, or abuse, and therefore, assuming a debt collector is aware of this effect, the debt collector's placement of even a small number of such calls may indicate that the debt collector has the requisite intent to annoy, abuse, or harass. In the Bureau's Debt Collection Consumer Survey, nearly 90 percent of respondents who

[293] Because proposed § 1006.14(b)(1)(ii) provides that a debt collector engaged in the collection of a consumer financial product or service debt must not exceed the calling frequency limits proposed in § 1006.14(b)(2), such a debt collector who exceeds the frequency limits also would violate proposed § 1006.14(b)(1)(ii). Separately, proposed § 1006.14(b)(4) provides a parallel bright-line rule that debt collectors who place telephone calls or engage in telephone conversations at or below the levels in § 1006.14(b)(2) do not, based on their calling frequency, violate the FDCPA, the Dodd-Frank Act, or § 1006.14(b)(1).

[294] While proposed § 1006.14(b)(2) would apply to ''any person,'' the Bureau uses the term ''consumer'' throughout this section-by-section analysis as a shorthand to refer both to consumers, as defined by the FDCPA, and others who may be contacted by debt collectors.

[295] See the section-by-section analysis of proposed § 1006.14(b)(3) for a discussion of the Bureau's proposed exceptions.

[296] Small Business Review Panel Outline, *supra* note 56, at 25.

[297] *See* Small Business Review Panel Report, *supra* note 57, at 37.

[298] Because proposed § 1006.14(b)(1)(ii) provides that a debt collector engaged in the collection of a consumer financial product or service debt must not exceed the frequency limits proposed in § 1006.14(b)(2), such a debt collector who places more than seven telephone calls within seven consecutive days also would violate § 1006.14(b)(1)(ii). Separately, under the proposal, a debt collector who placed seven or fewer telephone calls within a period of seven consecutive days would per se *not* have placed telephone calls repeatedly or continuously to the person at the called number. See the section-by-section analysis of proposed § 1006.14(b)(4).

said they were contacted more than three times per week indicated that they were contacted too often; 74 percent of respondents who said they were contacted one to three times per week indicated that that they were contacted too often; and 22 percent of respondents who said that they were contacted less than once per week indicated that even this level of contact was too often.[299] The effect on a consumer of a single debt collector placing repeated or continuous telephone calls is amplified by the fact that, according to the Bureau's research, almost 75 percent of consumers with at least one debt in collection have multiple debts in collection, such that many consumers may receive calls from multiple debt collectors each week.[300] Debt collectors who are aware that many consumers have multiple debts in collections and that these consumers are already receiving telephone calls from other debt collectors may be placing additional calls with intent to annoy, abuse, or harass those consumers.

At the same time, debt collectors have a legitimate interest in reaching consumers. The FDCPA's purposes include ''eliminat[ing] *abusive* debt collection practices by debt collectors'' and ensuring that debt collectors who refrain from such practices ''are not competitively disadvantaged.'' [301] The FDCPA does not contemplate that the elimination of abusive practices entails the elimination of ''the effective collection of debts.'' [302] Communicating with consumers is central to debt collectors' ability to recover amounts owed to creditors. Debt collectors typically must make multiple attempts before establishing what in industry parlance is referred to as ''right-party contact''—that is, before they actually speak to a consumer. Too greatly restricting the ability of debt collectors and consumers to communicate with one another could prevent debt collectors from establishing right-party contact and resolving debts, even when doing so is in the interests of both consumers and debt collectors. For example, during the SBREFA process, small entity representatives reported that consumers who do not communicate with a debt collector may have negative information furnished to consumer reporting agencies or may face additional fees or a collection lawsuit, which can entail the financial or opportunity cost of the lawsuit or subject a consumer to wage garnishment. And as much as some consumers might prefer to avoid speaking to debt collectors, many consumers benefit from communications that enable them to promptly resolve a debt through partial or full payment or an acknowledgement that the consumer does not owe some or all of the alleged debt.

The Bureau also has considered whether debt collectors' reliance on making repeated telephone calls to establish contact with consumers could be reduced by other aspects of the proposed rule that are designed to address legal ambiguities regarding how and when debt collectors may communicate with consumers. For example, as discussed above, debt collectors who leave voicemails for consumers currently face a dilemma about whether to risk liability under FDCPA sections 806(6) and 807(11) by omitting disclosures required under those sections, or risk liability under FDCPA section 805(b) by including the disclosures and potentially disclosing a debt to a third party who might overhear the message. Proposed § 1006.2(j) seeks to address that dilemma by defining a limited-content message that debt collectors may leave for consumers without violating FDCPA sections 805(b), 806(6), or 807(11). Permitting such messages should ensure that debt collectors can leave voicemails with a return call number for a consumer to use at the consumer's convenience, which may help reduce the need for debt collectors to place repeated telephone calls to contact consumers.[303]

Another legal ambiguity regarding how and when debt collectors may communicate with consumers is that the FDCPA does not address how debt collectors may use electronic communication media such as emails or text messages to communicate. The Bureau's proposals in §§ 1006.6(d)(3) and 1006.42 are designed to clarify that ambiguity so that debt collectors may communicate electronically with consumers who prefer to communicate that way. Further, for the reasons discussed in the section-by-section analysis of proposed § 1006.14(b)(1), the Bureau does not propose subjecting email, text messages, or other electronic communications to the proposed frequency limits.

Taking all of these factors into account, the Bureau proposes to draw the line at which a debt collector places telephone calls repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number (and the line at which such calls have the natural consequence of harassing, oppressing, or abusing any person) [304] at seven telephone calls in a seven-day period about a particular debt. The proposal would allow debt collectors to call up to seven times per week across multiple telephone numbers (*e.g.,* a home landline, mobile, and work), and to leave a limited-content message each time. It also would not limit how many mailed letters, emails, and text messages debt collectors could send. At the same time, by making clear that debt collectors cannot call consumers more than seven times each week about a particular debt in collection, the proposal would protect consumers and others from being harmed by debt collectors making repeated or continuous telephone calls with intent to annoy, abuse, or harass.

For the reasons discussed above, the Bureau proposes § 1006.14(b)(2)(i) to provide that, subject to proposed § 1006.14(b)(3), a debt collector violates proposed § 1006.14(b)(1)(i) by placing more than seven telephone calls within seven consecutive days to a particular person in connection with the collection of a particular debt. Proposed comment 14(b)(2)(i)–1 provides illustrative examples of the proposed rule.[305]

[299] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 31. Consumers were asked ''How often did this creditor or debt collector usually try to reach you each week, including times they did not reach you?'' Response options included: Less than once per week; one to three times per week; four to seven times per week; eight to 14 times per week; 15 to 21 times per week; and more than 21 times per week. A separate question asked consumers whether the debt collector had contacted them too often. Survey respondents had the option of indicating that they were not sure whether contacts had come from a debt collector, creditor, or another source. The data reflects responses given by any respondent who reported being contacted about a debt in collection. Limitations on the survey data include that respondents were not asked to distinguish between contact attempts and actual contacts and were not asked to specify whether they already had spoken with the debt collector who was trying to contact them. *Id.* at 30–31.

[300] *Id.* at 13, table 1.

[301] 15 U.S.C. 1692(e) (emphasis added).

[302] 15 U.S.C. 1692(c).

[303] See the section-by-section analysis of proposed § 1006.2(j) for a full discussion of the proposed limited-content message.

[304] *Litt* v. *Portfolio Recovery Assocs. LLC,* 146 F. Supp. 3d 857, 873 (E.D. Mich. 2015) (''[W]hile the general proscription of § 1692d does not use the word 'intent,' such a requirement is inferred from the necessity to establish that the natural tendency of the conduct is to embarrass, upset or frighten a debtor. If the natural tendency of certain conduct is to embarrass, upset or frighten, then one who engages in such conduct can be presumed to have intended the natural consequences of his act.''); *see also United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in result) (''[P]erhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent.'').

[305] The examples would clarify how the proposed rule would apply to calls to consumers or to third parties. The Bureau understands that debt collectors may make location calls to several numbers, but

Proposed comment 14(b)(2)(i)–2 would clarify how to determine the number of telephone calls a debt collector has placed if the debt collector learns that the telephone number that the debt collector previously used to call a person is not, in fact, that person's number. The comment would clarify that telephone calls placed to the wrong number are not counted towards the frequency limit in proposed § 1006.14(b)(2)(i) with respect to the person the debt collector is trying to contact. The Bureau proposes this clarification because a person is unlikely to be harassed by debt collection calls that are placed to a number that belongs to someone else.

The Bureau requests comment on several aspects of proposed § 1006.14(b)(2)(i). First, the Bureau requests comment on the proposal to set the frequency limit at seven telephone calls to a particular consumer within seven consecutive days regarding a particular debt, including on the harms to consumers that may be prevented by this limit and on how such a limit may impact debt collectors. Some stakeholders may take the position that this proposed line should be adjusted upward or downward to account for certain concerns. Debt collectors and other industry stakeholders have advised the Bureau that, today, they often need to make more telephone calls than would be allowed under the proposal in order to establish right-party contact; they have expressed concern that a too-restrictive limit may hamper their ability to reach consumers and collect debts. Consumer advocates have suggested that a lower call limit is necessary to prevent harassment in part because consumers with multiple debts in collection could receive multiple calls about each debt each week; under the proposed limits, for example, a consumer with four or five debts in collection could receive up to two or three dozen telephone calls each week.[306] Some consumer advocates therefore have recommended that the Bureau prohibit a debt collector from placing, for example, more than three telephone calls per week to any one consumer, regardless of how many debts the debt collector is trying to recover from that consumer.

The Bureau encourages commenters who believe the Bureau should set a higher or lower limit to provide data supporting any recommended numbers, such as data regarding the frequency of calls that debt collectors currently make and how that frequency relates to the time needed to establish right-party contact and payments received from consumers. The Bureau also encourages commenters to provide data demonstrating the marginal impact on consumers and debt collectors, as well as on competition and the cost of credit, of adjusting the weekly limit on telephone calls from the proposed seven calls per week to a different number. To the extent that a commenter recommends a higher limit on telephone calls to permit debt collectors to recover more payments from consumers, the Bureau encourages the commenter to submit data quantifying the benefits such increased recovery would have on competition or consumers, such as by lowering the cost of credit. The Bureau also requests data regarding the financial, emotional, or other impact on consumers of calls from debt collectors at varying levels of frequency. In addition, the Bureau requests comment on whether debt collectors currently are able to, or under the proposed rule would expect to be able to, establish right-party contact through voicemails or electronic media, such that debt collectors may have less of a need to place repeated telephone calls to consumers.

Second, the Bureau requests comment on the proposal to measure the frequency of telephone calls on a per-week basis. This framework could result in debt collectors placing, for example, seven telephone calls about one debt to a consumer in one day. The Bureau considered combining a seven-day frequency limit with a per-day frequency limit that would have prohibited, for example, more than one telephone call to a consumer per debt per day, up to a limit of seven telephone calls per consumer per debt every seven days. The Bureau does not propose a combined daily and weekly limit because, while such an approach would eliminate multiple telephone calls about a single debt on any given day, it might not provide flexibility for unforeseen situations or the need to attempt to contact some consumers at different telephone numbers and at different times of the day. It also is not clear that many debt collectors would respond to the proposed weekly limit on telephone calls by placing all of their permitted calls in rapid succession, thus foregoing the opportunity to call the consumer at a different time of day or on a different day of the week for the following seven days. Further, a rule with both daily and weekly frequency limits would sacrifice the ease of implementing and monitoring one frequency limit. The Bureau requests comment on its approach and on the merits of limiting telephone calls based on a different time period (*e.g.,* by day, by month, or through a combination of time periods).

Third, the Bureau requests comment on the proposal to apply frequency limits on a per-debt, rather than on a per-consumer, basis.[307] As proposed, § 1006.14(b)(2)(i) could permit, for example, a debt collector who is attempting to collect two debts from the same consumer to place up to 14 telephone calls in one week to that consumer without violating the FDCPA, the Dodd-Frank Act, or Regulation F based on the frequency of its calling. The Bureau requests comment on this aspect of the proposal, which also is discussed further in the section-by-section analysis of proposed § 1006.14(b)(5).

Fourth, the Bureau requests comment on the proposal to count telephone calls placed about a particular debt to different telephone numbers associated with the same consumer together for purposes of determining whether a debt collector has exceeded the limit in proposed § 1006.14(b)(2)(i) (*i.e.,* an aggregate approach). The Bureau considered a proposal that would have limited the number of calls permitted to any particular telephone number (*e.g.,* at most two calls to each of a consumer's landline, mobile, and work telephone numbers). The Bureau considered such a limit either instead of or in addition to an overall limit on the frequency of telephone calls to one consumer. The Bureau instead proposes an aggregate approach because of concerns that a more prescriptive, per-telephone number approach could produce undesirable results—for example, some consumers could receive (and some debt collectors could place) more telephone calls simply based on the number of telephone numbers that certain consumers happened to have (and that

that location calls do not generally involve frequently calling each number. Therefore the Bureau does not expect that debt collectors would be affected by the proposed limits as they apply to location calls made to third parties.

[306] The proposed frequency limits generally would apply per debt in collection (see proposed § 1006.14(b)(5)), and the Bureau's research shows that a majority of consumers who have at least one debt in collection have multiple debts in collection. For example, 57 percent of consumers with at least one debt in collection reported having between two and four debts in collection. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 13, table 1. Overall, the Bureau's research shows that almost 75 percent of consumers with at least one debt in collection have multiple debts in collection. *See id.; see also* CFPB Medical Debt Report, *supra* note 20, at 20 (reporting that most consumers with one tradeline have multiple tradelines).

[307] As discussed in the section-by-section analysis of proposed § 1006.14(b)(5), with respect to student loan debts, all debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector would be treated as a single debt for purposes of the frequency limits.

debt collectors happened to know about). Such an approach also could incentivize debt collectors to place telephone calls to less convenient telephone numbers after exhausting their telephone calls to consumers' preferred numbers. The Bureau requests comment on the merits of an aggregate versus a per-telephone number limit.

Finally, the Bureau requests comment on proposed comment 14(b)(2)(i)–2. In particular, the Bureau requests comment on whether the Bureau should provide additional clarification about how a debt collector determines that a telephone number is not associated with a particular person, or whether, for purposes of the proposed frequency limits, there is an alternative way to treat telephone calls inadvertently made to the wrong person.

The Bureau's Small Business Review Panel Outline described a proposal under consideration that would have limited a debt collector's weekly contact attempts with consumers by any communication medium. Before a debt collector confirmed contact with a consumer, the proposal under consideration would have imposed weekly limits of (i) three contact attempts per unique communication medium and (ii) six total contact attempts. After confirming contact with the consumer, a debt collector would have been subject to weekly limits of (i) two contact attempts per unique communication medium and (ii) three total contact attempts.[308] Many small entity representatives expressed a strong preference for bright-line, simplified rules. Many also stated that the proposal under consideration would inhibit communications between debt collectors and consumers and extend the time necessary to reach consumers. In particular, small entity representatives stated that they regularly attempt to contact consumers more than seven times per week when trying to establish right-party contact. Small entity representatives suggested several exceptions to the proposal under consideration, including telephone calls about which a consumer was unaware because, for example, the telephone number called was not, in fact, associated with that consumer.[309] In its report, the Small Business Review Panel recommended, among other things, that the Bureau consider whether the frequency limits should apply equally to all communication media (*e.g.,* telephone, postal mail, email, text messages, and other newer communication media).[310]

The Bureau considered the small entity representatives' feedback in developing the proposed frequency limits and believes that proposed § 1006.14(b)(2)(i) responds to many of the small entity representatives' concerns. In particular, proposed § 1006.14(b)(2)(i) would permit a debt collector to place seven telephone calls to a consumer in a seven-day period regarding a particular debt, without a different numerical limit on the number of calls the debt collector could make during a seven-day period after having established initial contact with the consumer. The proposal thus avoids potential ambiguities regarding when a debt collector has confirmed or lost contact with a consumer and may represent the type of bright-line, simplified approach that small entity representatives sought. The proposal would not limit debt collectors to sending a particular number of letters, emails, and text messages, and proposed comment 14(b)(2)(i)–2 would clarify that a telephone call to a number that the debt collector later determines is not associated with the consumer does not count toward the frequency limit. As discussed in the section-by-section analysis of proposed § 1006.14(b)(3), the Bureau proposes several other exceptions to the frequency limits in response to small entity representatives' feedback.

As noted above, the Bureau proposes § 1006.14(b)(2)(i) and its related commentary pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, and as an interpretation of FDCPA section 806(5), because a debt collector who places more than seven telephone calls to a particular person about a particular debt within seven consecutive days may have the intent to annoy, abuse, or harass the person.[311] Some debt collectors may, in fact, place more than seven telephone calls to a person each week precisely because they believe that additional telephone calls may cause sufficient harassment or annoyance to pressure the person to respond or make a payment that the person otherwise would not have made.

With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in proposed § 1006.2(f), the Bureau also proposes § 1006.14(b)(2)(i) pursuant to its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules applicable to a covered person or service provider that identify, and that may include requirements to prevent, unfair acts or practices in connection with any transaction with a consumer for a consumer financial product or service. To identify an act or practice as unfair under the Dodd-Frank Act, the Bureau must have a reasonable basis to conclude that: (1) The act or practice causes or is likely to cause substantial injury to consumers, which consumers cannot reasonably avoid; and (2) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.[312]

The Bureau proposes § 1006.14(b)(2)(i) to prevent[313] the unfair act or practice, identified in proposed § 1006.14(b)(1)(ii), of placing, in connection with the collection of a consumer financial product or service debt, telephone calls to any person repeatedly or continuously such that the natural consequence is to harass, oppress, or abuse any person at the called number. The Bureau proposes to set the frequency limit at seven telephone calls within seven consecutive days about a particular debt because such a limit appears to bear a reasonable relationship to preventing the unfair practice.[314]

[308] The proposals under consideration described in the Small Business Review Panel Outline would have applied the same limits for contact attempts to individuals other than the consumer, except that all third-party contact attempts would have been prohibited after the debt collector had successfully contacted the consumer, on the theory that the debt collector at that point would have had no reason to continue to engage in third-party outreach. The Bureau's proposal does not include the aspect of the Small Business Review Panel Outline that would have prohibited third-party contact attempts after the debt collector had successfully contacted the consumer. Proposed § 1006.10, which would implement FDCPA section 804's general prohibition against communicating more than once with a person to obtain location information, may provide sufficient protection regarding the making of location information communications when location information has already been obtained.

[309] *See* Small Business Review Panel Report, *supra* note 57, at 36–37.

[310] *Id.* at 37.

[311] Calls in excess of this limit may have the natural consequence of harassing, oppressing, or abusing a person at the called number, and, as noted above, the Bureau assumes that debt collectors intend the natural consequences of their actions.

[312] Dodd-Frank Act section 1031(c), 12 U.S.C. 5531(c).

[313] The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(i) by creditors and others generally not covered by the FDCPA would constitute an unfair act or practice under section 1031(c) of the Dodd-Frank Act if engaged in by those persons, rather than by an FDCPA-covered debt collector. The Bureau's proposal does not address, for example, whether consumers could reasonably avoid harm from creditor contacts or whether frequent creditor contacts provide greater benefits to consumers or competition.

[314] Dodd-Frank Act section 1031(c). Some courts have held that the consumer stated a claim under FDCPA section 806(5) where the debt collector called, on average, more than seven times per week. *See, e.g., U.S.* v. *Cent. Adjustment Bureau, Inc.,* 667

Consumers may suffer or be likely to suffer substantial injury from repeated or continuous debt collection telephone calls. Consumers have alleged in complaints lodged with the FTC and the Bureau, and in litigation, that such telephone calls can cause them, among other things, to suffer great emotional distress and anxiety, and that such calls can interfere with their health or sleep.[315] Consumers may pay debts that they otherwise might not have paid simply to stop the telephone calls. For example, consumers may pay debts that they do not owe or to which they have legal defenses; pay debts using funds that are exempt from collection; or pay the particular debt being collected instead of other debts or expenses that the consumer otherwise would prioritize, such as a secured or nondischargable debt or expenses for food, shelter, clothing, or medical treatment. A debt collector's telephone calls also may cause some consumers to incur charges on their mobile telephones.[316] Although the charge for an individual call may be minimal, the FCC has found that ''[t]hese costs can be substantial'' when aggregated across all consumers,[317] which is consistent with the FTC's and the Bureau's approach of aggregating all injuries (including small injuries) caused by a practice to determine whether the practice is unfair.[318]

Consumers may not be reasonably able to avoid the substantial injuries that could stem from frequent or repeated debt collection telephone calls. Many consumers carry their mobile telephones at all times to coordinate essential tasks or to be available in case of emergency.[319] Consumers also may share their mobile or landline telephones with family members. For these consumers, disengaging from all telephone calls to avoid debt collectors may not be an option. Moreover, courts have held that the ringing or vibrating alert caused by a debt collector's calls can contribute to harassment by conveying a sense of urgency to the consumer,[320] which can overwhelm some consumers, especially those with multiple debts in collection.

FDCPA section 805(c) provides, in part, that a debt collector generally shall not communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that the consumer wishes the debt collector to cease further communication.[321] Section 805(c), however, may be insufficient to permit consumers to reasonably avoid injuries from repeated or continuous telephone calls. First, many consumers may invoke the cease communication right only after they are harassed. Second, some consumers, even if they are aware of their rights, may not invoke them because ceasing communication entirely could make it more difficult to resolve the debt and, in turn, subject the consumer to other injuries. In particular, an unresolved debt could cause the consumer to incur additional fees, interest, adverse credit reporting, or, in the case of secured debts, loss of a home, automobile, or other property. Numerous debt collectors also have reported that a consumer who ceases communications is more likely to be sued and subjected to wage garnishment because the debt collector has no other way to recover on the debt.[322] Accordingly, a consumer who is aware of these potential outcomes, even if only in the abstract, or who wishes to resolve the debt in the future, may be reluctant to invoke the cease communication right to prevent harassment. Moreover, it may not be reasonable to expect a consumer to avoid harassment by invoking the cease communication right if doing so makes it more likely that the debt collector will sue the consumer to recover on the debt. Third, only a consumer as defined in FDCPA sections 803(3) and 805(d) may invoke the cease communication right, leaving other persons unable to invoke this remedy.

The Bureau proposes § 1006.14(b)(2)(i) because the injuries described above appear not to be outweighed by the countervailing benefits to consumers or to competition of more frequent telephone calls from FDCPA-covered debt collectors. If the proposed limit on telephone calls adversely affects debt collectors' ability to collect debts, the reduction in recoveries and corresponding increases in losses could result in an increase in the cost of credit. However, as discussed above and more fully in part VI, debt collectors may not need to make repeated or continuous telephone calls to collect debts effectively, and debt collectors may face diminishing returns as they increase the frequency of their calling. Further, the Bureau has sought

F. Supp. 370, 376, 394 (N.D. Tex. 1986), *aff'd as modified,* 823 F.2d 880 (5th Cir. 1987) (per curiam) (holding that debt collector violated FDCPA section 806(5) by, among other things, placing successive telephone calls in a single day and calling at least one consumer four-to-five times in a single day); *Schwartz-Earp* v. *Advanced Call Ctr. Techs.,* LLC, No. 15–CV–01582–MEJ, 2016 WL 899149, at *4 (N.D. Cal. Mar. 9, 2016) (denying debt collector's summary judgment motion where the debt collector called the consumer ''multiple times a day, with as many as five calls in a day,'' and remarking that ''the volume and pattern of calls alone is sufficient to raise a genuine dispute of material fact''); *Neu* v. *Genpact Servs., LLC,* No. 11–CV–2246 W KSC, 2013 WL 1773822, at *4 (S.D. Cal. Apr. 25, 2013) (holding that 150 telephone calls in 51 days raised a triable issue of fact as to the debt collector's intent to harass and observing that ''[a] reasonable trier of fact could find that [calling the consumer six times in one day] alone, apart from the sheer volume of calls placed by [the debt collector], is sufficient to find that [the debt collector] had the 'intent to annoy, abuse or harass' ''); *Forrest* v. *Genpact Servs., LLC,* 962 F. Supp. 2d 734, 737 (M.D. Pa. 2013) (holding that consumer stated a claim under FDCPA section 806(5) by alleging that debt collector called the consumer 225 times within 54 days); *Bassett* v. *I.C. Sys., Inc.,* 715 F. Supp. 2d 803, 810 (N.D. Ill. 2010) (denying debt collector's summary judgment motion where debt collector called the consumer 31 times in 12 days).

[315] See *supra* notes 286 and 287.

[316] See the section-by-section analysis of proposed § 1006.6(e).

[317] Fed. Comms. Comm'n, In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 8020 ¶ 118 (2015) (''In addition to the invasion of consumer privacy for all wireless consumers, the record confirms that some are charged for incoming calls and messages. These costs can be substantial when they result from the large numbers of voice calls and texts autodialers can generate.'').

[318] *Fed. Trade. Comm'n* v. *Pantron I Corp.,* 33 F.3d 1088, 1102–03 (9th Cir. 1994) (''Both the Commission and the courts have recognized that consumer injury is substantial when it is the aggregate of many small individual injuries.'') (citing *Orkin Exterminating Co.* v. *Fed. Trade. Comm'n,* 849 F.2d 1354, 1365 (11th Cir. 1988)); FTC Policy Statement on Unfairness, *supra* note 100, at 1073 n.12 (''An injury may be sufficiently substantial . . . if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm.''); Bureau of Consumer Fin. Prot., CFPB Examination Procedures, Unfair, Deceptive, or Abusive Acts or Practices, at 2 (Oct. 2012), *https://www.consumerfinance.gov/documents/4576/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf* (''An act or practice that causes a small amount of harm to a large number of people may be deemed to cause substantial injury.'').

[319] *See, e.g.,* Fed. Comms. Comm'n, In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7996 ¶ 61 (2015) at 7996 ¶ 61 (''Indeed, some consumers may find unwanted intrusions by phone more offensive than home mailings because they can cost them money and because, for many, their phone is with them at almost all times.'').

[320] *See, e.g., Clements* v. *HSBC Auto Fin., Inc.,* Civ. A. No. 5:09–cv–0086, 2011 WL 2976558, at *5 (S.D. W. Va. July 21, 2011) (noting that ''[m]issed calls communicate more than a phone number'' and ''can, depending on volume and frequency, communicate urgency and panic,'' but nevertheless finding that, based on the facts of the case, plaintiffs had suffered minimal emotional harm); *Bassett* v. *I.C. Sys., Inc.,* 715 F. Supp. 2d 803, 807–810 (N.D. Ill. 2010) (denying debt collector's summary judgment motion where debt collector placed 31 telephone calls to a consumer's blocked telephone and explaining that, although the consumer's telephone did not ring, the consumer could still have been harassed because the telephone displayed the incoming calls).

[321] 15 U.S.C. 1692c(c). Proposed § 1006.6(c) would implement FDCPA section 805(c).

[322] As noted earlier in this section-by-section analysis, the Bureau has received feedback from small entity representatives and other industry stakeholders that overly restrictive frequency limits could result in some of these same consumer harms, and the Bureau requests comment on the proposed frequency limits for that reason.

to mitigate concerns about increasing the cost of credit by limiting only the number of telephone calls placed per seven days, not the total number of telephone calls placed throughout the course of collections, thus permitting debt collectors to continue making as many telephone calls as needed, albeit over a longer period. Further, even if preventing harassing or oppressive contacts did have some marginal effect on collections success, the injuries caused by such contacts do not appear to be outweighed by countervailing benefits to consumers or to competition.

For similar reasons, the FTC and the Bureau previously have alleged through enforcement actions that repeated or continuous telephone calls or telephone conversations can constitute an unfair act or practice in violation of section 5 of the FTC Act and section 1031 of the Dodd-Frank Act.[323] For example, the FTC has alleged that a party engaged in an unfair act or practice under section 5 by making repeated or continuous telephone calls with intent to harass or abuse either consumers who owed debts or third parties, explaining that these calls can cause substantial injuries by, among other things, affecting the consumer's reputation, impairing the consumer's relationship with family, friends, and co-workers, and inducing the payment of disputed debts.[324] Similarly, the Bureau has alleged that a party engaged in unfair acts or practices under section 1031 by making an excessive number of telephone calls to consumers and by calling third parties repeatedly even after being informed that the calls were to the wrong person.[325]

Section 1031(c)(2) of the Dodd-Frank Act allows the Bureau to ''consider established public policies as evidence to be considered with all other evidence'' in determining whether an act or practice is unfair, as long as the public policy considerations are not the primary basis of the determination.[326] Established public policy appears to support the Bureau's proposed finding that it is an unfair act or practice for a debt collector who is collecting a consumer financial product or service debt to place telephone calls repeatedly or continuously such that the natural consequence is to harass, oppress, or abuse any person at the called number. Several consumer financial statutes and regulations, as well as industry standards,[327] require or recommend that debt collectors or others who are engaged in marketing or collections limit the frequency of their telephone calls to consumers. These include several State and local laws that limit the number of times a debt collector or creditor may call a consumer each week,[328] as well as the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Telephone Consumer Protection Act, and related FTC and FCC rulemakings that establish the Do Not Call Registry, limit the use of autodialers, and impose requirements related to Caller ID.[329] In short, Congress, State and local legislatures, and other agencies have found that consumers are harmed by repeated telephone calls. These established policies support a finding that it is an unfair act or practice for a debt collector who is collecting a consumer financial product or service debt to place telephone calls to a person repeatedly or continuously such that the natural consequence is to harass, oppress, or abuse any person at the called number, and they evince public policy that supports the Bureau's proposed frequency limits. The Bureau gives weight to this policy and bases its proposed finding that the identified act or practice is unfair in part on this body of public policy.

14(b)(2)(ii)

Proposed § 1006.14(b)(2)(ii) would provide that, subject to the exceptions in proposed § 1006.14(b)(3), a debt collector must not place a telephone call to a person in connection with the collection of a particular debt after already having had a telephone conversation with that person in connection with the collection of such debt within a period of seven consecutive days ending on the date of the call. Proposed comment 14(b)(2)(ii)–1 provides examples of the proposed rule.

In developing this proposal, the Bureau has considered both the legitimate interests of consumers and debt collectors in resolving debts and the potentially harmful effects on consumers of repeated or continuous telephone calls after a telephone conversation. A debt collector who already has engaged in a telephone conversation with a consumer about a debt may have less of a need to place additional telephone calls to that consumer about that debt within the next seven days than a debt collector who has yet to reach a consumer. As a result, the debt collector who has already conversed with a consumer may be more likely than the debt collector who has not conversed with a consumer to intend to annoy, abuse, or harass the consumer by placing additional telephone calls within one week after a telephone conversation. At the same time, a consumer who has spoken to a debt collector about a debt by telephone may be more likely than a consumer who has not spoken to a debt collector about a debt by telephone to experience annoyance, abuse, or harassment if the debt collector places additional, unwanted telephone calls to the consumer about that debt again within the next seven days.

A consumer may experience, and a debt collector may intend to cause, such

[323] Complaint at ¶¶ 56–58, *Fed. Trade Comm'n* v. *Citigroup Inc.,* No. 1:01–CV–00606 JTC (N.D. Ga. Mar. 6, 2001), *https://www.ftc.gov/sites/default/files/documents/cases/2001/03/citigroupcmp.pdf*(alleging that defendant engaged in an unfair act or practice under section 5 of the FTC Act by ''making repeated and continuous telephone calls to consumers with intent to annoy, abuse, or harass any person at the called number''); Consent Order at ¶¶ 5, 6, 19, *In re Avco Fin. Servs.,* 104 F.T.C. 485, 1984 WL 565343, at *2–3 (1984) (settling FTC's allegations that defendant engaged in an unfair act or practice under section 5 of the FTC Act by ''[m]aking repeated or continuous telephone calls to debtors or third parties with intent to harass or abuse persons at the called number,'' and explaining that these ''acts and practices * * * had and now [have] the capacity and tendency to cause substantial injury to debtors or third parties who are contacted by [defendant] by, among other things, adversely affecting the debtor's reputation, interfering with the debtor's or third party's employment relations including, but not limited to, causing warnings by employers of possible discharge, impairing the debtor's relations with friends, relatives, neighbors, and co-workers, and inducing the payment of disputed debts.''); Consent Order at ¶¶ 12, 19–23, *In re Ace Cash Express,* No. 2014–CFPB–0008 (July 10, 2014), *https://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf* (settling Bureau's allegations that defendant engaged in unfair acts or practices under section 1031 of the Dodd-Frank Act by, among other things, ''[m]aking an excessive number of calls to consumers' home, work, and cell phone numbers'' and ''[c]ontinuing to call consumers with no relation to the debt after being told that [defendant] had the wrong person''); *see also* Consent Order, *In re DriveTime Auto. Grp., Inc.,* 2014–CFPB–0017 (Nov. 19, 2014), *https://files.consumerfinance.gov/f/201411_cfpb_consent-order_drivetime.pdf* (settling Bureau's allegations that defendant engaged in unfair acts or practices under section 1031 of the Dodd-Frank Act ''by failing: (A) To prevent account servicing and collection calls to consumers' workplaces after consumers asked [defendant] to stop such calls; (B) to prevent calls to consumers' third-party references after the references or consumers asked [defendant] to stop calling them; and (C) to prevent calls to people at wrong numbers after they have asked [defendant] to stop calling'').

[324] *Avco Fin. Servs.,* 104 F.T.C. 485, 1984 WL 565343, at *2–3.

[325] *Ace Cash Express,* No. 2014–CFPB–0008.

[326] 12 U.S.C. 5531(c)(2).

[327] Many creditors and debt collectors have found it advantageous to adopt voluntary daily or weekly limits on telephone calls that they or their service provider make in connection with collecting debts. *See, e.g.,* Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market,* at 313–14 (Dec. 2017), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf*. See also *infra* part VI.B.2.

[328] See *supra* note 284.

[329] 15 U.S.C. 6101 *et seq.;* 47 U.S.C. 227; 16 CFR part 310; 47 CFR 64.1200 *et seq.;* 47 CFR 64.1600 *et seq.*

annoyance, abuse, or harassment from a second telephone conversation within one week even if the consumer, rather than the debt collector, initiated the first telephone conversation. Therefore, under the proposal, if a consumer initiated a telephone conversation with the debt collector, that telephone conversation generally would count as the debt collector's one permissible telephone conversation for the next week. In some instances, a consumer might request additional information when speaking with a debt collector and would not view a follow-up telephone call from the debt collector as harassing. For that reason, proposed § 1006.14(b)(3)(i), discussed below, would create an exception for telephone calls that are made to respond to a request for information from the consumer. Similarly, proposed § 1006.14(b)(3)(ii), also discussed below, would create an exception under which a consumer who wishes to speak to a debt collector more than once in one week could consent, in the first telephone conversation or by other media, to additional telephone calls from the debt collector.

The Bureau requests comment on proposed § 1006.14(b)(2)(ii). The Bureau considered, but does not propose, a frequency limit that would have limited only the total number of telephone calls that a debt collector could place to a person about a debt during a defined time period, regardless of whether the debt collector had engaged in a telephone conversation with that person about that debt during the relevant time period. The Bureau requests comment on the merits of such an alternative approach.

The Bureau proposes § 1006.14(b)(2)(ii) and its commentary pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and its authority to interpret FDCPA section 806(5). The Bureau proposes § 1006.14(b)(2)(ii) on the basis that, unless an exception (such as consent) applies, once a debt collector and a consumer engage in a telephone conversation regarding a particular debt, a debt collector who places additional calls to that person about that debt within the following seven days may intend to annoy, abuse, or harass the person.[330]

With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in proposed § 1006.2(f), the Bureau also proposes § 1006.14(b)(2)(ii) pursuant to its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules identifying and preventing unfair acts or practices.[331] Specifically, the Bureau proposes § 1006.14(b)(2)(ii) to prevent the unfair act or practice described in proposed § 1006.14(b)(1)(ii).[332] For the reasons discussed in the section-by-section analysis of proposed § 1006.14(b)(2)(i), and based on the evidence currently available to the Bureau, the Bureau believes that, if a debt collector places a telephone call to a particular person about a particular debt after already having spoken to that person about that debt within the previous seven days, the person naturally may feel harassed by the subsequent telephone call. For the reasons discussed in the section-by-section analysis of proposed § 1006.14(b)(2)(i), the debt collector's conduct may cause or be likely to cause the person to suffer substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition.[333] The Bureau thus proposes § 1006.14(b)(2)(ii) to establish a frequency limit that would prevent debt collectors from engaging in this unfair act or practice and, as detailed above, the Bureau proposes a limit of one telephone conversation per seven days on the theory that such a limit bears a reasonable relationship to preventing the unfair practice.

14(b)(3) Certain Telephone Calls Excluded From the Frequency Limits

Proposed § 1006.14(b)(3) describes four types of telephone calls that would not count toward, and that would be permitted in excess of, the frequency limits in proposed § 1006.14(b)(2). These are telephone calls that are: (i) Made to respond to a request for information from the person whom the debt collector is calling; (ii) made with such person's consent given directly to the debt collector; (iii) unable to connect to the dialed number; or (iv) placed to a person described in proposed § 1006.6(d)(1)(ii) through (vi). As discussed in the section-by-section analysis of proposed § 1006.14(b)(3)(i) through (iv) below, the Bureau proposes these exclusions pursuant to its authority under FDCPA section 814(d) to prescribe rules for the collection of debts by debt collectors and to implement and interpret FDCPA section 806(5). The Bureau proposes to exclude these telephone calls from counting toward the proposed frequency limits because they are unlikely to be harassing to consumers, and debt collectors are unlikely to place such calls with intent to annoy, abuse, or harass a person. The Bureau further proposes to exclude these telephone calls from counting toward the proposed frequency limits because they are unlikely to contribute to substantial injury that a person cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition. The Bureau requests comment on proposed § 1006.14(b)(3) and its related commentary, including on whether any other types of telephone calls should be excluded from the frequency limits.

During the SBREFA process, the Bureau's proposal under consideration noted that a bright-line frequency limit could except certain types of contacts, but it did not identify any specific exceptions. Many small entity representatives suggested exceptions, including for: (1) Contacts that respond to a consumer's request or question; (2) contact attempts that leave no ''footprint,'' such that the consumer is unaware of the telephone call or other contact attempt; (3) contacts with a consumer's attorney; and (4) contacts that are legally required. The Small Business Review Panel Report recommended that the Bureau consider incorporating such exceptions into the proposal.[334] The Panel Report also specifically recommended that the Bureau consider whether the frequency limits should be modified for communications that occur after a law firm files a complaint, on the grounds that one conversation per week might not be sufficient in various litigation situations. Proposed § 1006.14(b)(3) takes into account the small entity representatives' suggestions and the recommendations in the Panel Report. The Bureau does not propose an

[330] Unless an exception applies, a person who receives such a telephone call after already having spoken to the debt collector within the previous seven days may naturally feel harassed, oppressed, or abused, and, as noted above, the Bureau assumes that debt collectors intend the natural consequences of their actions.

[331] The Bureau has not determined in connection with this proposal whether telephone calls in excess of the limit in proposed § 1006.14(b)(2)(ii) by creditors and others not covered by the FDCPA would constitute an unfair act or practice under Dodd-Frank Act 1031(c) if engaged in by those persons, rather than by an FDCPA-covered debt collector.

[332] As with § 1006.14(b)(2)(i), proposed § 1006.14(b)(2)(ii) would apply when a debt collector places a telephone call to ''a person.''

[333] 12 U.S.C. 5531(c).

[334] *See* Small Business Review Panel Report, *supra* note 57, at 36. Other suggested exceptions in the Small Business Review Panel Report—including for contacts initiated by the consumer, contacts that occur through written correspondence (*e.g.,* letters), and misdirected contact attempts—are addressed elsewhere in the section-by-section analysis of proposed § 1006.14(b).

exception for legally required communications because the Bureau understands that very few legally required communications must be delivered by telephone and that, with respect to the few such communications that must be delivered telephonically, it appears unlikely that a debt collector would need to place more than seven telephone calls to a consumer within a period of seven consecutive days to deliver the required communication.

14(b)(3)(i)

Proposed § 1006.14(b)(3)(i) would exclude from the frequency limits telephone calls that a debt collector places to a person to respond to a request for information from that person. The Bureau proposes this exclusion because the Bureau believes that, if a person is speaking to a debt collector and asks for information that the debt collector does not have at the time of the telephone conversation, the person likely would expect (and not be harassed by) a return telephone call (or calls) from the debt collector providing the requested information; nor would the debt collector place the return telephone call with intent to annoy, abuse, or harass the person. Proposed comment 14(b)(3)(i)–1 would clarify that, once a debt collector provides a response to a person's request for information, the exception in proposed § 1006.14(b)(3)(i) would not apply to subsequent telephone calls placed by the debt collector to the person, unless the person makes another request. Proposed comment 14(b)(3)(i)–2 provides an example of the rule.[335]

The Bureau requests comment on the proposal to exclude from the frequency limits the placement of telephone calls that are made to respond to a request for information. The Bureau specifically requests comment on whether there should be any separate limit on the number of telephone calls a debt collector could place under the exception. As proposed, § 1006.14(b)(3)(i) would permit a debt collector who engages in a telephone conversation with a consumer to place an unlimited number of unanswered telephone calls to the consumer during the next seven days in an effort to provide the requested information. As proposed, § 1006.14(b)(3)(i) also would permit the debt collector to continue to exceed the frequency limits until the debt collector reached the consumer to respond to the request. A debt collector responding to a person's request for information may not need to place repeated or continuous telephone calls to reach the consumer, however, because such a debt collector is likely to have reliable contact information and the consumer presumably will be expecting the debt collector's telephone call. The Bureau requests comment on this approach and on alternatives to it. The Bureau also requests comment on whether additional clarification is needed on how to determine whether a debt collector makes a particular telephone call in response to a request for information, as opposed to for some other purpose, or on how to determine whether the debt collector has responded to a request for information, such that the exclusion no longer applies.

14(b)(3)(ii)

Proposed § 1006.14(b)(3)(ii) would exclude from the proposed frequency limits telephone calls that a debt collector places to a person with the person's prior consent given directly to the debt collector. The Bureau proposes to exclude such telephone calls from the frequency limits because the Bureau believes that a person can determine when additional telephone calls from, or telephone conversations with, a debt collector would not be harassing, and that a debt collector who has a person's consent to additional telephone calls would not be likely to place such calls with intent to annoy, abuse, or harass the person. The Bureau also believes that proposed § 1006.14(b)(3)(ii) may address small entity representatives' concerns about the frequency limits precluding necessary conversations in various litigation contexts because it would enable a person to consent to additional telephone calls if, for example, the parties were negotiating a settlement or resolving a discovery dispute.

Proposed comment 14(b)(3)(ii)–1 refers to the commentary to proposed § 1006.6(b)(4)(i) for guidance concerning a person giving prior consent directly to a debt collector. Proposed comment 14(b)(3)(ii)–2 provides an example of the rule. The Bureau requests comment on proposed § 1006.14(b)(3)(ii) and its related commentary, including on whether there should be a separate limit on the number of telephone calls that a debt collector could place under the proposed exception or whether there should be any other type of limitation or condition on the proposed exception.

14(b)(3)(iii)

Proposed § 1006.14(b)(3)(iii) would exclude from the frequency limits telephone calls that a debt collector places to a person but that are unable to connect to the dialed number (*e.g.,* that result in a busy signal or are placed to an out-of-service number). The Bureau proposes this exclusion because a person is unlikely to know about, let alone be harassed by, a debt collector's telephone call in response to which the debt collector receives a busy signal or a message indicating that the dialed number is not in service. Similarly, it appears that a debt collector who places several calls to a person in response to which the debt collector receives a busy signal or out-of-service notification is likely to place additional telephone calls to the person in an effort to contact the person and not with the intent to annoy, abuse, or harass the person.[336] The proposed exclusion also responds to feedback from small entity representatives suggesting that, for example, a telephone call met with a busy signal should not count toward the frequency limit.[337] Proposed comment 14(b)(3)(iii)–1 and –2 provide examples of telephone calls that are able and unable to connect to the dialed number. The Bureau requests comment on proposed § 1006.14(b)(3)(iii), including on whether the Bureau should include any other specific examples in commentary.

14(b)(3)(iv)

Proposed § 1006.14(b)(3)(iv) would exclude from the frequency limits telephone calls that a debt collector places to the persons described in proposed § 1006.6(d)(1)(ii) through (vi). Proposed § 1006.6(d)(1)(ii) through (vi) would implement, in part, FDCPA section 805(b)'s exception from the general prohibition on communicating

[335] Some State and local laws exclude responsive communications from their frequency limits. For example, Massachusetts' creditor-collection law provides that ''a creditor shall not be deemed to have initiated a communication with a debtor if the communication by the creditor is in response to a request made by the debtor for said communication''). 940 Code Mass. Regs. 7.04(1)(f). *See also* 9 Wash. Rev. Code 19.16.250(13)(a) (debt collector may exceed the weekly contact limit when ''responding to a communication from the debtor or spouse''); N.Y.C. Admin. Code 5–77(b)(1)(iv) (weekly contact limit does not include ''any communication between a consumer and the debt collector which is in response to an oral or written communication from the consumer'').

[336] The Bureau's approach in proposed § 1006.14(b)(3)(iii) is informed, in part, by State and local laws that exclude undeliverable contact attempts from their frequency limits. *See* Commonwealth of Mass., Off. of the Att'y Gen., *Guidance with Respect to Debt Collection Regulations* (2013), *https://www.mass.gov/files/documents/2016/08/xc/debt-collection-guidance-2013.pdf* (''unsuccessful attempts . . . to reach a debtor via telephone'' do not count toward the frequency limit in 940 Code Mass. Regs. 7.04(1)(f) ''if the creditor is truly unable to reach the debtor or to leave a message for the debtor); N.Y.C. Admin. Code 5–77(b)(1)(iv) (weekly contact limit does not include ''returned unopened mail'').

[337] *See* Small Business Review Panel Report, *supra* note 57, at 37.

about a debt with a person other than the consumer; it would permit a debt collector to communicate with a consumer's attorney, a consumer reporting agency, a creditor, a creditor's attorney, or a debt collector's attorney. Proposed § 1006.14(b)(3)(iv) would exclude from the frequency limits telephone calls placed to such persons on the basis that these persons are unlikely to be harassed by frequent and repeated telephone calls from a debt collector and that a debt collector is unlikely to place calls to such persons with intent to annoy, abuse, or harass them. Unlike most consumers, each of these persons has professional training and experience in, and is likely engaging in, the debt collection process in a professional capacity. Moreover, the Bureau is not aware of evidence that such persons receive an excessive number of telephone calls from debt collectors.

The Bureau also proposes to exclude telephone calls to such persons from the frequency limits because debt collectors may have non-harassing reasons for calling these persons more often than proposed § 1006.14(b)(2) would permit. For example, during litigation, a debt collector may need to speak frequently with its own attorneys, as well as with the creditor's or the consumer's attorneys; the Bureau's proposal would not limit such contacts. The Bureau requests comment on proposed § 1006.14(b)(3)(iv), including on whether telephone calls that a debt collector places to certain other persons also should be excluded from the frequency limits and, if so, which categories of persons should be excluded.

14(b)(4) Effect of Complying With Frequency Limits

Proposed § 1006.14(b)(4) would clarify the effect of complying with the frequency limits in § 1006.14(b)(2). Under proposed § 1006.14(b)(4), a debt collector who complies with (*i.e.,* does not exceed) the frequency limits in § 1006.14(b)(2) would per se comply with § 1006.14(b)(1). Proposed § 1006.14(b)(4) also would clarify that a debt collector who complies with § 1006.14(b)(2) does not violate either: (1) FDCPA section 806's general prohibition as it applies to placing telephone calls or engaging any person in telephone conversation repeatedly or continuously such that the natural consequence is to harass, oppress, or abuse the person; or (2) FDCPA section 806(5)'s specific prohibition against causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass the person. Based on the evidence currently available to the Bureau, the Bureau believes that a debt collector who places seven or fewer telephone calls to, and engages in one telephone conversation with, a particular consumer about a particular debt within a period of seven consecutive days, including the additional telephone calls permitted under proposed § 1006.14(b)(3), may not have the natural consequence of harassing, oppressing or abusing a person; that a debt collector who places such calls or engages in such conversations does not intend to annoy, abuse, or harass the person; and that such a frequency of telephone calls and conversations would not be repeated or continuous as those terms are used in FDCPA section 806(5).

Proposed § 1006.14(b)(4) also would clarify the consequence under the Dodd-Frank Act of complying with the frequency limits. Proposed § 1006.14(b)(4) provides that a debt collector who complies with § 1006.14(b)(2) does not violate Dodd-Frank Act sections 1031(c) or 1036(a)(1)(B) by engaging in the unfair act or practice of, in connection with the collection of a consumer financial product or service debt, placing telephone calls or engaging any person in telephone conversation repeatedly or continuously such that the natural consequence is to harass, oppress, or abuse the person. The Bureau proposes § 1006.14(b)(4) on the basis that telephone calls that do not exceed the frequency limits in § 1006.14(b)(2) do not cause substantial injury and that any possible injury is outweighed by the benefits to consumers or to competition. Under this interpretation, telephone calls at or below the frequency limits are unlikely to harass consumers and, in turn, are unlikely to cause substantial injury. Further, under this interpretation, debt collection provides substantial benefits to the consumer credit marketplace, and debt collectors may need to make telephone calls up to the frequency limits to collect debts effectively. Given these premises, any injury that might result from telephone calls at or below the frequency limits would be outweighed by the benefits to consumers or to competition.

The Bureau further believes that clarifying the effect of complying with proposed § 1006.14(b)(2), and creating a bright-line rule for compliance with it, could benefit both consumers and debt collectors. For debt collectors, the clarification should provide greater legal certainty and, in turn, should reduce the costs of litigation and threats of litigation about repeated or continuous contacts under FDCPA section 806 and 806(5). Consistent with this view, during the SBREFA process, small entity representatives expressed a preference for a bright-line approach. For consumers, a bright-line rule could make it easier to identify violations of the FDCPA. Providing a bright-line rule for determining compliance with the FDCPA and the Dodd-Frank Act therefore may be appropriate to advance the objectives of the FDCPA and title X of the Dodd-Frank Act.

Proposed § 1006.14(b)(4) would not provide a debt collector with protection from liability as to any other provision of the proposed rule, the FDCPA, or the Dodd-Frank Act. For example, proposed § 1006.14(b)(4) would not protect a debt collector from liability for using obscene language or false representations in connection with collection of a debt, in violation of FDCPA sections 806 or 807 (as proposed to be implemented by §§ 1006.14 and 1006.18). Similarly, proposed § 1006.14(b)(4) would not protect a debt collector from liability for communicating with a consumer in violation of FDCPA section 805(a) or (c) (as proposed to be implemented by § 1006.6(b)(1) and (c)). Nor would proposed § 1006.14(b)(4) protect a debt collector from liability under the Dodd-Frank Act for engaging in other unfair, deceptive, or abusive acts or practices.

The Bureau requests comment on all aspects of proposed § 1006.14(b)(4). The Bureau specifically requests comment on whether proposed § 1006.14(b)(4) adequately addresses concerns about debt collectors making telephone calls in rapid succession and, if not, what approach would address such calling behavior without imposing undue or unnecessary costs on debt collectors. For example, under the Bureau's proposed approach, a debt collector would not violate § 1006.14(b)(1) by placing seven or fewer telephone calls in rapid succession, so long as the debt collector did not exceed seven telephone calls or one telephone conversation with the same person about the same debt during a period of seven consecutive days.

The Bureau also requests comment on whether, instead of a bright-line rule, the Bureau should adopt a rebuttable presumption of compliance and of a violation. Under a rebuttable presumption approach, a debt collector who places telephone calls at or below the frequency limits presumptively would comply with § 1006.14(b)(1). Likewise, a debt collector who exceeds the frequency limits presumptively would violate § 1006.14(b)(1). These presumptions could be rebutted based on the facts and circumstances of a

particular situation. For example, a consumer could rebut the presumption of compliance for a debt collector who stayed below the frequency limits by showing that the debt collector knew or should have known that telephone calls, even below the frequency limits, would have the natural consequence of harassing, oppressing, or abusing the consumer. Similarly, a debt collector who exceeded the frequency limits could rebut the presumption of a violation by showing that, under the circumstances, additional calls above the limits would not have the natural consequence of harassing, oppressing, or abusing the consumer.

Finally, the Bureau requests comment on the alternative of adopting only a rebuttable presumption of a violation or only a rebuttable presumption of compliance. For example, one alternative would be to provide a safe harbor only for telephone calls below the frequency limits, with no provision for telephone calls above the frequency limits. Such an approach would provide certainty to both debt collectors and consumers about a per se permissible level of calling, but it would leave open the question of how many telephone calls is too many under the FDCPA and the Dodd-Frank Act. The Bureau does not propose such an approach because it appears that it would not provide the clarity that debt collectors and consumers have sought; nor does it appear to provide the same degree of consumer protection as a per se prohibition against telephone calls in excess of a specified frequency. Another alternative that the Bureau considered is a safe harbor for telephone calls below the limits paired with a rebuttable presumption of a violation for telephone calls above the limits. (The Bureau also considered the opposite: A rebuttable presumption of compliance for telephone calls below the limits paired with a per se prohibition against telephone calls in excess of the limits). The Bureau requests comment on the merits of these alternative approaches and others that the Bureau may not have considered.

14(b)(5) Definition

Proposed § 1006.14(b)(5) generally would define the term particular debt, as that term is used in proposed § 1006.14(b)(2), to mean each of a consumer's debts in collection. With respect to student loan debts, however, the term particular debt would mean all debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector. Proposed § 1006.14(b)(5) would clarify how the frequency limits in § 1006.14(b)(2) would apply when a consumer has multiple debts being collected by the same debt collector at the same time.[338]

In some cases, when a consumer has multiple debts in collection, either from one creditor or from multiple creditors, a single debt collector will attempt to collect some or all of them. Debt collectors in this situation typically make distinct efforts to collect each debt rather than, for example, asking the consumer about all of the debts during a single telephone call. One reason for this segregation is that larger debt collectors often collect multiple debts owed by the same consumer to different creditors, and each creditor may require its debt collectors to keep information about its debts separate from information about other creditors' debts. A creditor may require this so that it can ensure that debt collectors are complying with the creditor's specific debt collection guidelines. Consequently, some larger debt collectors may have groups of employees dedicated to collecting only a particular creditor's debts.

In addition, some debt collectors segregate debts because they have employees who specialize in collecting different types of debts. In other cases, such as with medical debts, privacy concerns or State or Federal laws may require a debt collector to segregate information about a particular debt from information about a consumer's other debts. A consumer's debts also may enter collection at different points in time and thus be at different stages of the collections process, such that the different debts may be eligible for different types of settlement offers. Debt collectors report that, in many cases, their systems are not structured to consolidate information about different debts owed by the same consumer. Finally, debt collectors may not find it productive to discuss multiple debts on a single telephone call because consumers may not be able or prepared to discuss more than one debt during the telephone call or may find it overwhelming, confusing, or simply too time consuming to discuss multiple debts, with different related terms and offers, during a single telephone call.

The Bureau considered proposing a limit on the number of times a debt collector could place telephone calls to any one person within seven days (*i.e.,* a per-person limit), regardless of how many debts the debt collector was attempting to collect from that person. Creditors, however, could sidestep a per-person limit by placing debts with debt collectors who collect for only one or a limited number of creditors, or by assigning only a single debt to any one debt collector. Alternatively, if one debt collector were collecting multiple debts for multiple creditors, a per-person limit could incentivize the debt collector to discuss all of those debts with the consumer in the single permissible telephone conversation each week. This could result in consumers receiving an overwhelming amount of information about, for example, different settlement or payment structures for different creditors. This also could complicate debt collection conversations if, for example, consumers wanted to dispute one or some, but not all, of the debts. Alternatively, a per-person limit could encourage debt collectors to sequence collection of a consumer's debts, thereby prolonging the collections process for some debts. For these reasons, and pursuant to its authority under FDCPA section 814(d) to prescribe rules for the collection of debt by debt collectors, the Bureau proposes § 1006.14(b)(5) to define the term particular debt, as used in proposed § 1006.14(b)(2), generally to mean each of a consumer's debts in collection.

The concerns outlined above may not apply to the collection of multiple student loan debts that were serviced under a single account number at the time the debts were obtained by the debt collector. In these situations, the debt collector and consumer appear to interact as if there were only a single debt. This would be consistent with how the loans were likely serviced before entering collection, as multiple student loan debts are often serviced under a single account number and billed on a single, combined account statement, with a single total amount due and requiring a single payment from the consumer. For this reason, in the case of student loan debts, the Bureau proposes to define the term particular debt to mean all such debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector. Under proposed § 1006.14(b)(5), the frequency limits in proposed § 1006.14(b)(2) would apply to all such debts collectively. Proposed comment 14(b)(5)–1 provides illustrative examples.

[338] This clarification may be necessary because most consumers with at least one debt in collection have multiple debts in collection. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 13, table 1; *see also* CFPB Medical Debt Report, *supra* note 20, at 20 (reporting that most consumers with one collections tradeline have multiple collections tradelines).

The Bureau requests comment on the proposed definition of particular debt. The Bureau specifically requests comment on the proposal to apply the frequency limits in proposed § 1006.14(b)(2) generally on a per-debt, as opposed to per-person, basis. The Bureau requests comment on whether, if the proposed per-debt approach is adopted, additional clarification is needed about how to count telephone calls when a debt collector places one telephone call to a consumer to discuss more than one particular debt. In particular, the Bureau requests comment on whether the rule should clarify how the frequency limits apply when a debt collector places an unanswered telephone call to a consumer to discuss two of the consumer's debts (*e.g.,* a credit card debt and a medical debt), or when a debt collector who is collecting two such debts leaves the consumer only a general message that does not refer specifically to either debt (*e.g.,* ''Please remember to pay what you owe''). The Bureau similarly requests comment on whether clarification is needed for the situation in which a debt collector has a telephone conversation with a consumer about more than one debt but does not specifically refer to either debt, and on whether the proposal appropriately counts the single conversation as having been about all of the debts for purposes of the frequency limits.

Finally, the Bureau requests comment on: (1) The proposal to aggregate certain student loan debts for purposes of § 1006.14(b)(2), including whether some student loan debts serviced under the same account number should be counted separately; and (2) whether any types of debts other than student loans should be aggregated, such that multiple debts that were serviced under a single account number at the time the debts were obtained by the debt collector (or met other specified conditions) would be treated as a single debt for purposes of the frequency limits. Under such an approach, for example, multiple medical debts could be aggregated for purposes of § 1006.14(b)(2) if they met certain conditions, such as being serviced under the same account number at the time the debt collector obtained them. The Bureau requests comment on such an approach, including on the possible difficulties of aggregating accounts other than student loan accounts given the different facts that could apply to each debt.

14(h) Prohibited Communication Media [339]

14(h)(1) In General

Proposed § 1006.14(h)(1) would prohibit a debt collector from communicating or attempting to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. Pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.14(h)(1) as an interpretation of FDCPA section 806, which, as discussed in part IV, prohibits a debt collector from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.

Since the enactment of the FDCPA, the possible media through which communications generally are conducted has expanded beyond telephone, mail, and in-person conversations to include various mobile and portable technologies that were not contemplated in 1977. For example, with the advent of the mobile telephone, a consumer may receive a telephone call at any time or place. As the CFPB Debt Collection Consumer Survey indicated, consumers have varied but strong preferences about the media that debt collectors use to communicate with them.[340]

Once a consumer has requested that a debt collector not use a specific medium of communication to communicate with the consumer, the Bureau believes that the natural consequence of further communications or attempts to communicate from the debt collector to the consumer using that same medium likely is harassment, oppression, or abuse of the consumer. Consistent with this interpretation, the Bureau understands that some debt collectors currently refrain from communicating with a consumer through a medium that the consumer has requested that the debt collector not use to communicate with the consumer, including, for example, specific telephone numbers that the consumer has asked the debt collector not to call.

For these reasons, the Bureau proposes § 1006.14(h)(1) to provide that, in connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. The Bureau also proposes commentary to § 1006.14(h)(1). Proposed comment 14(h)(1)–1 refers to comment 2(d)–1 for examples of communication media. Proposed comment 14(h)(1)–2 would clarify that, within a medium of communication, a consumer may request that a debt collector not use a specific address or telephone number and provides an example. The Bureau proposes this comment on the grounds that a specific address or telephone number may be considered a medium, and that contacting a consumer through a specific address or telephone number that the consumer has requested the debt collector not use may be just as harassing as contacting the consumer through a medium of communication that the consumer has requested the debt collector not use. The Bureau requests comment on proposed § 1006.14(h)(1) and its related commentary.

As discussed above, pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.14(h)(1) as an interpretation of FDCPA section 806, on the basis that once a consumer has requested that a debt collector not use a specific medium of communication to communicate with the consumer, a debt collector who nevertheless continues to communicate or attempt to communicate with the consumer using that medium is engaging in conduct the natural consequence of which is to harass, oppress, or abuse. The Bureau believes that proposed § 1006.14(h)(1) is consistent with this statutory language and the purpose of the FDCPA. As FDCPA section 802(e) explains, in relevant part, the purpose of the Act is to eliminate abusive debt collection practices by debt collectors.[341] The Bureau interprets FDCPA section 806's general prohibition on engaging in conduct the natural consequence of which is to harass, oppress, or abuse in light of this purpose specified in the FDCPA, as well as in light of similar conduct specifically prohibited by the FDCPA.

14(h)(2) Exceptions

Proposed § 1006.14(h)(2) provides two exceptions to the general prohibition in proposed § 1006.14(h)(1). Proposed

[339] As noted above, proposed § 1006.14(c) through (g) generally mirror the statute, with minor wording and organizational changes for clarity, and are not discussed further in this section-by-section analysis.

[340] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 36–37.

[341] 15 U.S.C. 1692(e).

§ 1006.14(h)(2)(i) provides that, notwithstanding the prohibition in § 1006.14(h)(1), if a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer's request to opt out, provided that the reply contains no information other than a statement confirming the consumer's request. Proposed § 1006.14(h)(2)(ii) provides that, if a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication. The Bureau proposes § 1006.14(h)(2) because a single communication from a debt collector of the types described likely would not have the natural consequence of harassing, oppressing, or abusing the consumer within the meaning of FDCPA section 806.[342] The Bureau requests comment on the exceptions in proposed § 1006.14(h)(2).

As discussed above, a consumer may request that a debt collector not communicate with the consumer using a specific medium of communication. However, there may be circumstances in which applicable law requires the debt collector to communicate with the consumer only through that specific medium and does not offer an alternative medium for compliance (*e.g.,* by permitting a debt collector to electronically provide a notice that otherwise would be mailed). The Bureau requests comment on whether there are specific laws that require communication with the consumer through one specific medium, and if so, whether additional clarification is needed regarding the delivery of legally required communications through a specific medium of communication required by applicable law if the consumer has generally requested that the debt collector not use that medium to communicate with the consumer.

Section 1006.18 False, Deceptive, or Misleading Representations or Means

FDCPA section 807 generally prohibits a debt collector from using any false, deceptive, or misleading representations or means in connection with the collection of any debt. The section lists 16 non-exhaustive examples of such prohibited conduct.[343] Proposed § 1006.18 would implement FDCPA section 807. Except for certain organizational changes and interpretations in § 1006.18(e) through (g), which are discussed below, proposed § 1006.18 generally restates the statute with only minor wording changes for clarity. The Bureau proposes § 1006.18 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

The Bureau proposes to organize § 1006.18 by grouping the 16 non-exhaustive examples of prohibited false or misleading representations in FDCPA section 807 into categories of related conduct, as follows. Proposed § 1006.18(a) would implement the general prohibition in FDCPA section 807 by prohibiting a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. Proposed § 1006.18(b) restates FDCPA section 807's examples of false, deceptive, or misleading representations.[344] Proposed § 1006.18(c) restates FDCPA section 807's examples of false, deceptive, or misleading collection means.[345] Proposed § 1006.18(d) restates the catch-all prohibition against false representations or deceptive means as described in FDCPA section 807(10). Proposed § 1006.18(e) addresses the disclosures required under FDCPA section 807(11). Finally, proposed § 1006.18(f) addresses the use of assumed names by debt collectors' employees, and proposed § 1006.18(g) addresses misrepresentations of meaningful attorney involvement in debt collection litigation.

18(e) Disclosures Required

FDCPA section 807(11) requires debt collectors to disclose in their initial communications with consumers that they are attempting to collect a debt and that any information obtained will be used for that purpose, and to disclose in their subsequent communications with consumers that the communication is from a debt collector, except in a formal pleading made in connection with a legal action.[346] Proposed § 1006.18(e) would implement FDCPA section 807(11).

Proposed comment 18(e)(1)–1 describes the circumstances in which debt collectors would be required to provide disclosures in initial communications under proposed § 1008.18(e)(1). Proposed comment 18(e)(1)–1 specifies that a debt collector must provide the disclosures in the debt collector's initial communication with the consumer, regardless of whether that initial communication is written or oral, and regardless of whether the debt collector or the consumer initiated the communication. Proposed comment 18(e)(1)–1 also provides an example of the rule regarding required disclosures during initial communications.

Proposed comment 18(e)–1 provides general commentary to explain how the disclosure requirements in proposed § 1006.18(e) interact with the proposed rule's limited-content message, a message that is not a communication under proposed § 1006.2(d). Proposed comment 18(e)–1 would clarify that, because a limited-content message is not a communication, a debt collector who leaves only a limited-content message for a consumer does not need to provide the disclosures required under proposed § 1008.18(e)(1) and (2). For a more detailed discussion of the terms communication and limited-content message, see the section-by-section analysis of proposed § 1006.2(d) and (j), respectively.

The Bureau requests comment on all aspects of proposed § 1006.18 and on whether additional clarification would be useful. In particular, the Bureau requests comment on whether additional clarification regarding false or misleading representations would be helpful in the decedent debt context, or whether to require any affirmative disclosures when debt collectors communicate in connection with the collection of a debt owed by a deceased consumer. As discussed in the section-by-section analysis of proposed §§ 1006.2(e) and 1006.6(a)(4), this proposal would define the term consumer to clarify with whom debt collectors may communicate when attempting to resolve the debts of a deceased consumer. In its Policy Statement on Decedent Debt, the FTC expressed concern that, even absent explicit misrepresentations, a debt collector might violate FDCPA section 807 by communicating with such individuals in a manner that conveys the misleading impression that the individual is personally liable for the

[342] Proposed § 1006.14(h)(2) also is consistent with the regulations implementing the CAN–SPAM Act, which permit senders to send a reply electronic message. *See* 16 CFR 316.5.

[343] 15 U.S.C. 1692e.

[344] Proposed § 1006.18(b)(1)(i) through (viii) would implement, respectively, paragraphs (1), (16), (3), (7), (6), (12), (13), and (15) of FDCPA section 807, and proposed § 1006.18(b)(2) would implement FDCPA section 807(2). Restating the statutory language is not intended to suggest any particular interpretation of that language. For example, the omission of the words ''or imply'' from the introductory language to § 1006.18(b)(2) consistent with the statutory language in FDCPA section 807(2) is not intended to suggest that the Bureau would not regard implied false representations as violations of FDCPA section 807 or 807(2) or proposed § 1006.18(b)(2).

[345] Proposed § 1006.18(c)(1) through (4) would implement, respectively, paragraphs (5), (8), (9), and (14) of FDCPA section 807.

[346] 15 U.S.C. 1692e(11).

deceased consumer's debts, or that the debt collector could seek assets outside of the deceased consumer's estate to satisfy the consumer's debt. The FTC's Policy Statement suggested two possible disclosures that debt collectors generally could use to avoid deceiving such individuals about their liability for the decedent's debts.[347] The FTC also noted that the information that would need to be disclosed to avoid deception would depend on the circumstances.

While the Bureau believes that the FTC's suggested disclosures generally would be sufficient to avoid deception in many circumstances, proposed § 1006.18 would not require such disclosures. Since the FTC issued its Policy Statement in 2011, neither the FTC nor the Bureau has brought any cases against debt collectors for making deceptive claims in the decedent debt context, including any such claims concerning the liability of other individuals for the decedent's debts. Proposed § 1006.18's general prohibition against false, deceptive, or misleading representations, however, would apply to express or implied misrepresentations that a personal representative is liable for the deceased consumer's debts. The Bureau requests comment on whether the general prohibition against false, deceptive, or misleading representations in proposed § 1006.18 is sufficient to protect individuals who communicate with debt collectors about a deceased consumer's debts, or whether affirmative disclosures in the decedent debt context are needed.

18(f) Use of Assumed Names

Debt collectors commonly instruct or permit their employees to use assumed names when interacting with consumers, including by telephone. They do so for a variety of reasons. For example, some employees may have names that are difficult for some consumers to spell or pronounce. These employees may find that assuming a simpler name facilitates communications with consumers. Other employees may have privacy or safety concerns about revealing their true name and employer to a potentially large number of consumers.

From a consumer's perspective, it may not be relevant whether employees use true names or assumed names, provided that the name used does not mislead the consumer about the debt at issue and who is attempting to collect it. For example, the FTC previously issued guidance stating that a debt collector's employee does not violate the FDCPA by using an assumed name if the employee uses the assumed name consistently and the debt collector can readily ascertain the employee's identity.[348] An employee's consistent use of that name is not likely to affect the decisions a consumer makes about the debt. Further, a debt collector's ability to readily ascertain the employee's identity would enable the debt collector to monitor and address the conduct of such employee. Therefore, an approach similar to the FTC's prior guidance may be appropriate for the use of assumed names.

For these reasons, proposed § 1006.18(f) provides that nothing in § 1006.18 prohibits a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the employer can readily identify the employee even if the employee is using the assumed name. The Bureau requests comment on proposed § 1006.18(f), including on the use of assumed names by debt collectors' employees in general, as well as on whether and how employers can readily identify their employees who are using assumed names.

The Bureau proposes § 1006.18(f) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. Specifically, the Bureau interprets FDCPA section 807's prohibition on false or misleading representations, and 806(6)'s prohibition on placing telephone calls without ''meaningful disclosure of the caller's identity,'' to allow a debt collector's employee to disclose an assumed name as long as the employee uses the name consistently and the debt collector can readily ascertain that employee's true identity.

18(g) Safe Harbor for Meaningful Attorney Involvement in Debt Collection Litigation Submissions

FDCPA section 807 contains certain provisions designed to protect consumers from false, deceptive, or misleading representations made by, or means employed by, attorneys in debt collection litigation. FDCPA section 807(3) prohibits the false representation or implication that any individual is an attorney or that any communication is from an attorney. In addition, debt collection communications sent under an attorney's name may violate FDCPA section 807(10) if the attorney was not meaningfully involved in the preparation of the communication.[349] The meaningful attorney involvement case law has been applied in the specific context of debt collection litigation submissions.[350]

It may be particularly important for consumers, attorneys, and law firms engaged in such litigation to be protected by a clear articulation of what meaningful attorney involvement in debt collection litigation submissions means under FDCPA section 807, as would be implemented by proposed § 1006.18. A clear articulation of meaningful attorney involvement also may be useful to avoid confusion and unnecessary conflicts between State standards and Federal standards under the FDCPA and any implementing regulations.

To provide clarity for law firms and attorneys submitting pleadings, written motions, or other papers to courts in debt collection litigation, proposed section § 1006.18(g) provides a safe harbor for attorneys and law firms against claims that they violated § 1006.18 due to the lack of meaningful attorney involvement in debt collection litigation materials signed by the attorney and submitted to the court,

[347] FTC Policy Statement on Decedent Debt, *supra* note 192, at 44922. The FTC's suggested disclosures were: ''(1) That the collector is seeking payment from the assets in the decedent's estate; and (2) [that] the individual could not be required to use the individual's assets or assets the individual owned jointly with the decedent to pay the decedent's debt.'' *Id.*

[348] Fed. Trade Comm'n, Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097, 50105 (Dec. 13, 1988) (''1. *Aliases.* A debt collector employee's use of an alias that permits identification of the debt collector (*i.e.,* where he uses the alias consistently, and his true identity can be ascertained by the employer) constitutes a ''meaningful disclosure of the caller's identity.''); *see also id.* at 50103 (''An individual debt collector may use an alias if it is used consistently and if it does not interfere with another party's ability to identify him (*e.g.,* the true identity can be ascertained by the employer).'').

[349] *See, e.g., Clomon* v. *Jackson,* 988 F.2d 1314, 1320 (2d Cir. 1993); *Nielsen* v. *Dickerson,* 307 F.3d 623, 635 (7th Cir. 2002). Courts have found violations of other subsections of FDCPA section 807 for similar conduct. *See e.g., Avila* v. *Rubin,* 84 F.3d 222, 229 (7th Cir. 1996); *Lesher* v. *Law Offices of Mitchell N. Kay, PC,* 650 F.3d 993, 1002 (3d Cir. 2011).

[350] *See Miller* v. *Upton, Cohen & Slamowitz,* 687 F.Supp.2d 86, 100 (applying meaningful involvement liability to, among other actions, filing of complaint in court); *Bock* v. *Pressler & Pressler,* 30 F.Supp.3d 283, 303 (D.N.J. 2014) (''The claimed misrepresentation here does not relate to the ultimate veracity of the numbered factual allegations of the complaint; it concerns the veracity of the implied representation that an attorney was meaningfully involved in the preparation of the complaint. If, in fact, the attorney who signed the complaint is not involved and familiar with the case against the debtor, then the debtor has been unfairly misled and deceived within the meaning of the FDCPA. . . .''), *reaff'd on remand,* 254 F.Supp.3d 724, 729 (D.N.J. 2017).

provided that they meet the requirements in proposed § 1006.18(g). Proposed § 1006.18(g) provides that an attorney has been meaningfully involved in the preparation of debt collection litigation submissions if the attorney: (1) Drafts or reviews the pleading, written motion, or other paper; and (2) personally reviews information supporting the submission and determines, to the best of the attorney's knowledge, information, and belief, that, as applicable: The claims, defenses, and other legal contentions are warranted by existing law; the factual contentions have evidentiary support; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

The factors in proposed § 1008.18(g) are similar to some of the nationally recognized standards for attorneys making submissions in civil litigation.[351] Because most FDCPA claims are considered by Federal courts, and Federal court rules are adopted and apply nationwide, Federal Rule of Civil Procedure 11(b)(2) through (4) as currently adopted may provide an appropriate guide for judging whether a submission to the court has complied with § 1006.18(g). Indeed, courts that have applied the meaningful attorney involvement doctrine to litigation submissions have considered that standard.[352] Accordingly, the safe harbor in proposed § 1006.18(g) restates certain provisions of Federal Rule of Civil Procedure Rule 11(b). An attorney or law firm who establishes compliance with the factors set forth in proposed § 1006.18(g), including when a court in debt collection litigation determines that the debt collector has complied with a court rule that is substantially similar to the standard in § 1006.18(g), will have complied with FDCPA section 807 regarding the attorney's meaningful involvement in submissions made in debt collection litigation. The Bureau requests comment on whether the safe harbor proposed for meaningful attorney involvement in debt collection litigation submissions provides sufficient clarity for consumers, attorneys, and law firms.

Section 1006.22 Unfair or Unconscionable Means

FDCPA section 808 prohibits a debt collector from using any unfair or unconscionable means to collect or attempt to collect any debt and lists eight non-exhaustive examples of such prohibited conduct.[353] The Bureau proposes § 1006.22 to implement and interpret FDCPA section 808 and pursuant to its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors.

Proposed § 1006.22(a) would implement FDCPA section 808's general prohibition against unfair debt collection practices, and proposed § 1006.22(b) through (f)(2) would implement the prohibited conduct examples in FDCPA section 808.[354] These proposed paragraphs generally mirror the statute, with minor wording and organizational changes for clarity. The following section-by-section analysis thus discusses only proposed § 1006.22(f)(3) and (4) and (g).

22(f) Restrictions on Use of Certain Media

Proposed § 1006.22(f)(3) and (4) would restrict a debt collector's use of two specific types of electronic media: Work email accounts and public-facing social media. As to electronic media more generally, the Bureau plans to monitor their evolution and use by debt collectors, as well as any trends in FDCPA section 808 litigation concerning such media, to identify issues that pose a risk of consumer harm or require clarification as part of any future rulemakings.

22(f)(3)

Proposed § 1006.22(f)(3) would prohibit a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address.

The FDCPA contains both general and specific prohibitions intended to protect consumers from the harms that workplace collections communications can cause. For example, absent obtaining the consumer's prior consent, a debt collector who discloses a debt to a consumer's employer generally would violate FDCPA section 805(b)'s prohibition on communicating with a third party about a debt.[355] A debt collector also could violate FDCPA section 805(a)(3) by communicating with the consumer at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communications.[356]

Debt collectors and consumers may have questions about how the FDCPA's protections against third-party disclosures apply to workplace contacts by newer means of communication, such as email. Debt collectors should be aware that many employers have a legal right to read, and in fact frequently do read, messages sent or received by employees on their work email accounts.[357] Workplace emails therefore present a particularly high risk of third-party disclosure through an employer reading an email sent by a debt collector to a consumer's work account. In addition, Congress and the courts have recognized that an employer learning that an employee has a debt in collection may cause the consumer to suffer significant harms, including loss

[351] The factors in proposed § 1008.18(g) omit the following two aspects of Federal Rule of Civil Procedure 11(b)(2) through (4): First, that the claims, defenses, or other legal contentions are a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and second, that the factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. This safe harbor is proposed in part to set clearer standards for routine debt collection litigation cases, in which there is unlikely to be an argument to extend, modify, or reverse existing law or to establish new law. The Bureau also understands that most factual contentions pled in debt collection litigation should be supported by evidence in the creditor's or debt collector's possession, thereby negating the need for further investigation or discovery. Moreover, proposed § 1006.18(g) would provide a safe harbor; thus, meeting one of these omitted aspects may permit an attorney to establish meaningful attorney involvement even if doing so would not entitle the attorney to the safe harbor that proposed § 1006.18(g) would establish.

[352] *See, e.g., Bock* v. *Pressler & Pressler,* 2017 WL 4711472 at *7 n.5 (discussing initial decision at 30 F.Supp.3d 283, 299–302); *Miller,* 687 F.Supp.2d at 101 (analogizing to Rule 11).

[353] 15 U.S.C. 1692f.

[354] Specifically, proposed § 1006.22(b) would implement FDCPA section 808(1); proposed § 1006.22(c) would implement FDCPA section 808(2) through (4); proposed § 1006.22(d) would implement FDCPA section 808(5); proposed § 1006.22(e) would implement FDCPA section 808(6); proposed § 1006.22(f)(1) would implement FDCPA section 808(7); and proposed § 1006.22(f)(2) would implement FDCPA section 808(8).

[355] 15 U.S.C. 1692c(b).

[356] 15 U.S.C. 1692c(a)(3).

[357] *See, e.g.,* Am. Mgmt. Ass'n & ePolicy Inst., *Electronic Monitoring and Surveillance 2007 Survey* (2008), *http://www.amanet.org/training/articles/2007-electronic-monitoring-and-surveillance-survey-41.aspx* (reporting that a survey of employers conducted in 2007 found that, among other things, 43 percent of employers monitored their employees' email accounts and 66 percent of employers monitored their employees' internet connection, with 45 percent of employers tracking the content, keystrokes, and time spent at the keyboard); *Bingham* v. *Baycare Health Sys.,* No. 8:14–CV–73–T–23JSS, 2016 WL 3917513, at *4 (M.D. Fla. July 20, 2016) (collecting cases and concluding that ''the majority of courts have found that an employee has no reasonable expectation of privacy in workplace emails when the employer's policy limits personal use or otherwise restricts employees' use of its system and notifies employees of its policy'').

of employment.[358] The Bureau proposes § 1006.22(f)(3) on the ground that a debt collector who sends a communication to a consumer's work email account violates the FDCPA if the debt collector knows or can reasonably anticipate that a communication sent to a consumer's work email account might be opened and read by someone other than the consumer. There is support for this interpretation in court decisions holding that a debt collector who sends a letter to a consumer's place of employment violates the FDCPA if the debt collector ''knew or could reasonably anticipate that [such] a letter . . . might be opened and read by someone other than the debtor as it made its way to [the consumer].'' [359]

As suggested by numerous consumer advocacy groups and a consortium of State attorneys general in comments to the Bureau's ANPRM, requiring a debt collector to obtain a consumer's consent, or to have received an email from the consumer, before sending emails to the consumer's work account could protect the consumer's privacy interest in avoiding the disclosure of the debt to the consumer's employer. This privacy interest is implicated by both communications and attempts to communicate. A debt collector's initial, unsolicited email that does not convey information regarding a debt nonetheless may induce a recipient such as a consumer or an employer to inquire about the purpose of the debt collector's message. The debt collector's attempt to communicate thus may lead to the disclosure of the debt to a third party before the consumer has had a meaningful opportunity to provide prior consent. A consumer who chooses to use a work email account to contact a debt collector, or who provides prior consent for the debt collector to use such an email account to contact the consumer, presumably has made a determination that the benefits of communicating with a debt collector about a debt using a work email account outweigh the potential risks, and a debt collector who receives such an email or prior consent from the consumer may not reasonably anticipate that its emails to the consumer would be read by the consumer's employer. Accordingly, after a consumer uses the work email account to contact the debt collector or provides prior consent, it would not appear to be an unfair or unconscionable practice under FDCPA section 808 for a debt collector to communicate or attempt to communicate with the consumer using an email address that the debt collector knows or should know is provided by the consumer's employer.

For all of these reasons, pursuant to its authority to implement and interpret FDCPA section 808 and its authority under FDCPA section 814(d) to write rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.22(f)(3) to prohibit a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address.

Proposed comment 22(f)(3)–1 notes that, even after providing prior consent directly to a debt collector, a consumer could opt out of receiving emails at a work email address at any time using instructions provided by a debt collector pursuant to proposed § 1006.6(e), or otherwise request not to receive emails at that address pursuant to proposed § 1006.14(h). Proposed comment 22(f)(3)–1 also refers to the commentary to proposed § 1006.6(b)(4)(i) for additional guidance on prior consent.

Proposed comment 22(f)(3)–2 would clarify that a debt collector who receives an email directly from a consumer from an email address provided by the consumer's employer may communicate or attempt to communicate with the consumer at that email address, even if the consumer's email does not provide prior consent to the debt collector. Proposed comment 22(f)(3)–2 also provides an example of such a situation.

Proposed comment 22(f)(3)–3 provides examples of email addresses that a debt collector knows or should know are provided to the consumer by the consumer's employer. Proposed comment 22(f)(3)–3 also states that, in the absence of contrary information, a debt collector neither would know nor should know that an email address is provided to the consumer by the consumer's employer if the email address's domain name is one commonly associated with a provider of non-work email addresses. Examples of domain names that are commonly associated with a provider of non-work email addresses would include *gmail.com, yahoo.com, hotmail.com, aol.com*, or *msn.com*, among others.[360]

During the SBREFA process, small entity representatives sought guidance on how they would know whether an email address is provided to a consumer by an employer and also suggested that a consumer's consent to use a work email should transfer from the creditor to the debt collector.[361] Proposed comment 22(f)(3)–3, which addresses when a debt collector knows or should

[358] S. Rept. No. 382, *supra* note 70, at 1699 (''[A] debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.''); *id.* at 1696 (''Collection abuse takes many forms, including . . . disclosing a consumer's personal affairs to friends, neighbors, or an employer.''); 122 Cong. Rec. H730707 (daily ed. July 19, 1976) (remarks of Rep. Annunzio on H. Rept. 13720) (Clearinghouse No. 31,059U) (''Communication with a consumer at work or with his employer may work a tremendous hardship for a consumer because such calls can embarrass a consumer and can result in his losing a deserved promotion'' and ''[i]f a consumer loses his job, he is in a worse, not better, position to pay the debt.''); *Am. Fin. Servs. Ass'n* v. *Fed. Trade Comm'n,* 767 F.2d 957, 974 (D.C. Cir. 1985) (upholding provision in the FTC's Credit Practices Rule that prohibited certain wage assignments because, among other things, the rulemaking record showed that ''employers tend to view the consumer's failure to repay the debt as a sign of irresponsibility. As a consequence many lose their jobs after wage assignments are filed. Even if the consumer retains the job, promotions, raises, and job assignments may be adversely affected.'') (citing Credit Practices Rule, 49 FR 7740, 7758 (1984) (codified at 16 CFR 444)); *Fed. Trade Comm'n* v. *LoanPointe, LLC,* No. 2:10–CV–225DAK, 2011 WL 4348304, at *6–8 (D. Utah Sept. 16, 2011) (holding that ''Defendants' practice of disclosing debts and the amount of the debts to consumers' employers'' violated the FDCPA and ''qualifies as an unfair practice under the FTC Act''), *aff'd,* 525 F. App'x 696 (10th Cir. 2013). The State of New York prohibits a debt collector from corresponding with a consumer by email unless, among other things, the consumer voluntarily provided the email address to the debt collector and has affirmed that the email is not ''furnished or owned by the consumer's employer.'' 23 N.Y. Comp. Codes R. & Regs. tit. 23, sec. 1.6(a) (2018).

[359] *Evon* v. *Law Offices of Sidney Mickell,* 688 F.3d 1015, 1025–26 (9th Cir. 2012) (holding that a letter addressed ''in care of [consumer's] employer'' and delivered to her at work, ''manifestly constitutes a violation [of the FDCPA because the debt collector] knew or could reasonably anticipate that a letter sent to a class member's employer might be opened and read by someone other than the debtor as it made its way to him/her. This is exactly what happened to [the consumer], causing her stress and embarrassment, precisely what the Act is designed to prevent.''); *see also* Fed. Trade Comm'n, Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097–02, 50104 (Dec. 13, 1988) (''*Accessibility by third party.* A debt collector may not send a written message that is easily accessible to third parties. For example, he may not use a computerized billing statement that can be seen on the envelope itself. A debt collector may use an 'in care of' letter only if the consumer lives at, or accepts mail at, the other party's address.'').

[360] *See, e.g., Email-Verify.My.Addr.com, List of Most Popular Email Domains (By Number of Live Emails), https://email-verify.my-addr.com/list-of-most-popular-email-domains.php* (last visited May 6, 2019) (listing the most popular email domain names, ranked by number of live emails).

[361] These comments were similar to ANPRM comments submitted by several industry members, who noted that debt collectors may not be able to determine accurately whether an email address is provided by an employer because, among other things, the domain name may not signify that it is a work email or the consumer may consolidate multiple email accounts.

know that an email address is provided by a consumer's employer, is designed to provide such guidance. In addition, proposed § 1006.22(f)(3) would not apply a strict liability standard, so a debt collector would not violate the rule if the debt collector neither knew nor should have known that the debt collector used a consumer's work email address. The Bureau does not propose, however, that a consumer's prior consent to receive email on the consumer's work account from a creditor would transfer to a debt collector. A consumer may enter into a transaction with, and consent to receiving emails on their work account from, a creditor based on the characteristics of that particular creditor; in contrast, consumers generally have no ability to choose which debt collector attempts to collect their debt.

One small entity representative recommended that emails to a consumer's work address be presumptively prohibited only if the debt collector knows or should know that the employer prohibits such contact (*i.e.,* applying the FDCPA section 805(a)(3) framework to work email accounts).[362] As discussed above, workplace email communications present a particularly high risk of third-party disclosure because many employers have a legal right to read messages sent or received by employees on their work email accounts. For this reason, the prohibition in proposed § 1006.22(f)(3) does not apply the FDCPA section 805(a)(3) framework. Rather, to protect consumers from loss of employment and risk of embarrassment, the Bureau proposes to require that a debt collector obtain prior consent to use that email address directly from the consumer, or have received an email sent from the consumer's work email account, before using the consumer's work email account.

The Bureau requests comment on all aspects of proposed § 1006.22(f)(3). In particular, the Bureau requests comment on whether FDCPA section 805(a)(3)'s framework should apply to emails to a consumer's work account, so that such emails are presumptively prohibited only when a debt collector knows or should know that a consumer's employer prohibits the consumer from receiving such communications. The Bureau also requests comment on whether more clarification is necessary regarding when a debt collector knows or should know that the debt collector is communicating using a consumer's work email address and, if so, what circumstances should indicate to a debt collector that an email address is provided by a consumer's employer. The Bureau further requests comment on the scope of proposed § 1006.22(f)(3). As proposed, it would apply only to email contacts with the person obligated or allegedly obligated to pay a debt (*i.e.,* a person defined as a consumer under proposed § 1006.2(e)). The Bureau requests comment on whether it should be broadened to apply to email contacts with a consumer as defined in proposed § 1006.6(a).

22(f)(4)

Proposed § 1006.22(f)(4) provides that a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of a debt by a social media platform that is viewable by a person other than the consumer or other person described in proposed § 1006.6(d)(1)(i) through (vi).

The FDCPA contains numerous provisions that guard against the disclosure of the consumer's financial affairs to individual third parties or the broader public.[363] For example, FDCPA section 805(b) generally prohibits communicating with third parties in connection with the collection of a debt; FDCPA section 806(3) prohibits publishing public ''shame lists'' of consumers who allegedly refuse to pay their debts; [364] and FDCPA section 808(7) and (8) prohibits communicating with a consumer regarding a debt by postcard or using most language or symbols on the outside of an envelope. The Bureau believes that communications or attempts to communicate by social media platforms that are viewable by a person other than a person with whom a debt collector may communicate under FDCPA section 805(b) similarly risk exposing a consumer's affairs to the public. For example, a debt collector's message to a consumer posted on a public-facing social media page may be viewed by many of the consumer's social or professional contacts, who may interpret a widely distributed message asking that the consumer return a call as an indication that the consumer is delinquent on an obligation. Accordingly, a debt collector may engage in an unfair or unconscionable act by, in connection with the collection of a debt, communicating or attempting to communicate with a consumer by publicly viewable social media platform.

Such conduct also may have the natural consequence of harassing, oppressing, or abusing the consumer. Although some social media contacts, such as a limited-content message, may not convey information regarding a debt directly or indirectly to any person, given the many other ways a debt collector could attempt to communicate with a consumer that are not viewable by a potentially wide array of the consumer's social or professional colleagues—such as by telephone, text message, postal mail, email, or private message through the same social media platform—a debt collector may have no legitimate purpose in contacting a consumer by publicly viewable social media. As a result, such conduct may serve only to harass, oppress, or abuse.

For these reasons, and pursuant to its authority under FDCPA section 814(d) and to interpret FDCPA sections 806 and 808, proposed § 1006.22(f)(4) provides that a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of a debt by a social media platform that is viewable by a person other than a person described in proposed § 1006.6(d)(1)(i) through (vi). Proposed comment 22(f)(4)–1 provides examples illustrating the proposed rule.

The Bureau requests comment on all aspects of proposed § 1006.22(f)(4), including on whether debt collectors anticipate that they will use social media platforms to contact consumers. The Bureau also requests comment on whether debt collectors have any non-harassing purpose for attempting to communicate with consumers using public-facing social media platforms and, if so, whether proposed § 1006.22(f)(4) should have an exception for attempts to communicate such as limited-content messages. The Bureau further requests comment on the scope of proposed § 1006.22(f)(4). As proposed, it would apply only to social media contacts with the person obligated or allegedly obligated to pay a debt (*i.e.,* a person defined as a consumer under proposed § 1006.2(e)). The Bureau requests comment on

[362] See the section-by-section analysis of proposed § 1006.6(b)(3).

[363] Invasion of individual privacy appears to have been one of the primary harms that Congress sought to eliminate through the FDCPA. FDCPA section 802(a), (e); 15 U.S.C. 1692(a), (e); S. Rept. No. 382, *supra* note 70, at 1699 (''[A] debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.''); *id.* at 1696 (''Collection abuse takes many forms, including . . . disclosing a consumer's personal affairs to friends, neighbors, or an employer.''); *see also Douglass* v. *Convergent Outsourcing,* 765 F.3d 299, 303 (3d Cir. 2014) (describing ''the invasion of privacy'' as ''a core concern animating the FDCPA'').

[364] S. Rept. No. 382, *supra* note 70, at 1696.

whether it should be broadened to apply to social media contacts with any person described as a consumer in proposed § 1006.6(a).

22(g) Safe Harbor for Certain Emails and Text Messages Relating to the Collection of a Debt

FDCPA section 808 contains certain provisions designed to protect consumer privacy. As noted, FDCPA section 808(7) prohibits a debt collector from communicating with a consumer regarding a debt by postcard, and FDCPA section 808(8) generally prohibits a debt collector from using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by postal mail. As courts have recognized, these provisions aim to protect consumer privacy by limiting public disclosure of a consumer's debts.[365] The examples in FDCPA section 808(7) and (8) apply to postal mail practices. In pre-proposal feedback, industry groups noted that uncertainty about how similar prohibitions might be applied to emails and text messages discourages the use of those technologies to communicate with consumers.

To mitigate such uncertainty while also protecting consumer privacy, proposed § 1006.22(g) provides that a debt collector who communicates with a consumer using an email address, or telephone number for text messages, and follows the procedures described in proposed § 1006.6(d)(3) does not violate § 1006.22(a) by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt. The procedures in proposed § 1006.6(d)(3) are designed to ensure that a debt collector who uses a particular email address or telephone number to communicate with a consumer by email or text message does not have a reason to anticipate that an unauthorized third-party disclosure may occur. If the proposed procedures work as designed, there would not be a reason to anticipate that a third party would see the debt collector's name or other debt-collection-related information included in a communication sent to such an email address or telephone number. Some pre-proposal feedback raised the possibility that a third party could read an electronic communication on, for example, the consumer's mobile telephone by looking over the consumer's shoulder. However, this feedback did not include any actual evidence of the prevalence of such behavior. Moreover, consumers generally should be able to manage over-the-shoulder risk by choosing where and when to read electronic communications and how to configure their devices.

Proposed § 1006.22(g) would provide a safe harbor only as to claims that a debt collector violated § 1006.22 by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt. The proposed provision would not provide a safe harbor as to claims that a debt collector's email or text message violated the FDCPA or Regulation F in other ways. The Bureau requests comment on proposed § 1006.22(g).

In the Small Business Review Panel Outline, the Bureau described a proposal under consideration to prohibit a debt collector from sending an email message to a consumer if the ''from'' or ''subject'' lines contained information revealing that the email was about a debt.[366] The Bureau's concern was that such information could reveal to others that the communication related to a debt.[367] The Bureau does not propose this restriction described in the Small Business Review Panel Outline. In pre-proposal feedback, debt collectors suggested that the restriction would make electronic communication generally more difficult. Some industry participants predicted that, if debt collectors were required to exclude from an email's ''from'' or ''subject'' lines all information suggestive of debt collection, consumers would be less likely to understand the email's purpose and more likely to treat the email like spam and delete or ignore it. This is consistent with research suggesting that the most important factors in whether a consumer will open an email are whether they recognize the sender and the content of the subject line.[368] Proposed § 1006.6(d)(3), which, as noted above, describes procedures for obtaining and using an email address or a telephone number that is unlikely to lead to a third-party disclosure, may be a more effective initial step to minimize the risk of third-party disclosure.

Section 1006.26 Collection of Time-Barred Debts

Proposed § 1006.26 contains interventions related to the collection of time-barred debts. Proposed § 1006.26(a) would define several terms, and proposed § 1006.26(b) would prohibit debt collectors from suing or threatening to sue consumers to collect time-barred debts. The Bureau proposes § 1006.26 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

26(a) Definitions

Proposed § 1006.26(a) would define several terms used in § 1006.26 but not defined in the FDCPA. These definitions would facilitate compliance with proposed § 1006.26(b), which would interpret FDCPA section 807 to prohibit debt collectors from suing and threatening to sue consumers to collect time-barred debts.

26(a)(1) Statute of Limitations

Proposed § 1006.26(a)(2), discussed below, would define the term time-barred debt to mean a debt for which the applicable statute of limitations has expired. Proposed § 1006.26(a)(1), in turn, would define the term statute of limitations to mean the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt.

Statutes of limitations typically are established by State law and provide time limits for bringing suit on legal claims.[369] They reflect a public policy determination that it is unjust to subject defendants to suit after a specified period.[370] For debt collection claims, the length of the applicable statute of limitations often varies by State and, within each State, by debt type.[371] Most statutes of limitations applicable to debt collection claims are between three and six years, although some are as long as 15 years.[372]

[365] *See, e.g., Douglass* v. *Convergent Outsourcing,* 765 F.3d 299, 302 (3d Cir. 2014) (''Section 1692f evinces Congress's intent to screen from public view information pertinent to the debt collection.'').

[366] Small Business Review Panel Outline, *supra* note 56, at appendix H.

[367] *Id.*

[368] Direct Marketing Ass'n, *Consumer Email Tracker 2017,* at 18 (2017), *https://dma.org.uk/uploads/misc/5a1583ff3301a-consumer-email-tracking-report-2017-(2)_5a1583ff32f65.pdf.*

[369] Federal law sometimes establishes the statute of limitations. For example, legal actions to recover certain telecommunications debt are subject to a statute of limitations set by Federal law. *See* 47 U.S.C. 415(a).

[370] *See, e.g., United States* v. *Kubrick,* 444 U.S. 111, 117 (1979) (''Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.'' (internal citation and quotation marks omitted)).

[371] *See* Fed. Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,* at 24 (July 2010) (hereinafter FTC Litigation Report).

[372] *See* FTC Debt Buying Report, *supra* note 14, at 42.

Debt collectors generally are familiar with the concept of statutes of limitations, and the proposed definition generally should be consistent with debt collectors' understanding of the term. The Bureau requests comment on the proposed definition and whether any additional clarification is needed.

26(a)(2) Time-Barred Debt

Proposed § 1006.26(a)(2) would define the term time-barred debt to mean a debt for which the applicable statute of limitations has expired. Debt collectors generally are familiar with the concept of time-barred debt, and the definition of time-barred debt in proposed § 1006.26(a)(2) is consistent with debt collectors' understanding of the term.

Many debt collectors already determine whether the statute of limitations applicable to a debt has expired. Some do so to comply with State and local disclosure laws that require them to inform consumers when debts are time barred.[373] Others do so to assess whether they can sue to collect the debt, which may affect their collection strategy. The information that debt buyers generally receive when bidding on and purchasing debts, and the information that other debt collectors generally receive at placement, should allow them to determine whether the applicable statute of limitations has expired.[374] The Bureau requests comment on the proposed definition and on whether any additional clarification is needed.

26(b) Suits and Threats of Suit Prohibited

Under the laws of most States, expiration of the applicable statute of limitations, if raised by the consumer as an affirmative defense, precludes the debt collector from recovering on the debt using judicial processes, but it does not extinguish the debt itself.[375] In other words, in most States, a debt collector may use non-litigation means to collect a time-barred debt, as long as those means do not violate the FDCPA or other laws. If a debt collector does sue to collect a time-barred debt and the consumer proves the expiration of the statute of limitations as an affirmative defense, the court will dismiss the suit. Multiple courts have held that suits and threats of suit on time-barred debt violate the FDCPA, reasoning that such practices violate FDCPA section 807's prohibition on false or misleading representations, FDCPA section 808's prohibition on unfair practices, or both.[376] The FTC has also concluded that the FDCPA bars actual and threatened suits on time-barred debt.[377] In addition, at least one industry group requires its members to refrain from suing or threatening to sue on time-barred debts.[378] Nevertheless, the Bureau's enforcement experience suggests that some debt collectors may continue to sue or threaten to sue on time-barred debts.[379]

A debt collector who sues or threatens to sue a consumer on a time-barred debt may explicitly or implicitly misrepresent to the consumer that the debt is legally enforceable, and that misrepresentation likely is material to consumers because it may affect their conduct with regard to the collection of that debt, including, for example, whether to pay it.[380] In response to the Bureau's ANPRM, some consumer advocacy groups and State Attorneys General observed that consumers are often uncertain about their rights concerning time-barred debt. The Bureau's consumer testing to date is consistent with those observations.[381] In addition, as courts have recognized, the passage of time ''dulls the consumer's memory of the circumstances and validity of the debt'' and ''heightens the probability that [the consumer] will no longer have personal records detailing the status of the debt.'' [382] Consumers sued or threatened with suit on a time-barred debt may not recognize that the debt is time barred, that time-barred debts are unenforceable in court, or that generally they must raise the expiration of the statute of limitations as an affirmative defense.

Suits and threats of suit on time-barred debts can harm consumers in multiple ways. A debt collector's threat to sue on a time-barred debt may prompt some consumers to pay or prioritize that debt over others in the mistaken belief that doing so is necessary to forestall litigation. Similarly, suits on time-barred debts may lead to judgments against consumers on claims for which those consumers had meritorious defenses, including, but not limited to, a statute-of-limitations defense. Such judgments may be especially likely given that few consumers sued for allegedly unpaid debts—whether time-barred or not—actually defend themselves in court, and those who do often are unrepresented. As a result, the vast majority of judgments on unpaid debts, including on time-barred debts, are default judgments, entered solely on the representations contained in the debt collector's complaint.[383]

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[373] *See, e.g.,* Cal. Civ. Code § 1788.52(d)(3); Conn. Gen. Stat. § 36a–805(a)(14); Mass. Code Regs., tit. 940, § 7.07(24); N.M. Code. R. § 12.2.12.9(A); N.Y. Comp. Codes R. & Regs., tit. 23, § 1.3; New York City, N.Y., Rules, tit. 6, § 2–191(a); W. Va. Code § 46a–2–128(f).

[374] *See* FTC Debt Buying Report, *supra* note 14, at 49 (''The data the Commission received from debt buyers suggests that debt buyers usually are likely to know or be able to determine whether the debts on which they are collecting are beyond the statute of limitations.''); CFPB Debt Collection Operations Study, *supra* note 45, at 23 (noting that the majority of respondents reported always or often receiving, among other things, debt balance at charge off, account agreement documentation, and billing statements).

[375] In Mississippi and Wisconsin, debts are extinguished when the applicable statute of limitations expires. *See* Miss. Code Ann. § 15–1–3 (''The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy.''); Wis. Stat. Ann. § 893.05 (''When the period within which an action may be commenced on a Wisconsin cause of action has expired, the right is extinguished as well as the remedy.'').

[376] *See, e.g., Pantoja* v. *Portfolio Recovery Assocs., LLC,* 852 F.3d 679, 683–84 (7th Cir. 2017); *McMahon* v. *LVNV Funding, LLC,* 744 F.3d 1010, 1020 (7th Cir. 2014); *Phillips* v. *Asset Acceptance, LLC,* 736 F.3d 1076, 1079 (7th Cir. 2013); *Huertas* v. *Galaxy Asset Mgmt.,* 641 F.3d 28, 33 (3d Cir. 2011); *Goins* v. *JBC & Assocs., P.C.,* 352 F. Supp. 2d 262, 273 (D. Conn. 2005); *Kimber* v. *Fed. Fin. Corp.,* 668 F. Supp. 1480, 1487–89 (M.D. Ala. 1987).

[377] FTC Litigation Report, *supra* note 371, at 23.

[378] Receivables Mgmt. Ass'n Int'l, *Receivables Management Certification Program,* at 32 (Jan. 2018), *https://rmassociation.org/wp-content/uploads/2018/02/Certification-Policy-version-6.0-FINAL-20180119.pdf* (''A Certified Company shall not knowingly bring or imply that it has the ability to bring a lawsuit on a debt that is beyond the applicable statute of limitations, even if state law revives the limitations period when a payment is received after the expiration of the statute.''); *see also* David E. Reid, *Out-of-Statute Debt: What is a Smart, Balanced, and Responsible Approach,* at 8 (Receivables Mgmt. Ass'n Int'l, White Paper, 2015), *https://rmassociation.org/wp-content/uploads/2017/04/RMA_Whitepaper_OOS.pdf* (''Although, as noted, the statute of limitations is an affirmative defense that, in almost all states, must be raised by the defendant or it is waived, it is improper to knowingly file OSD [*i.e.,* out-of-statute debt] suits and wait to see if the defense is pled.'').

[379] Consent Order at ¶¶ 65–69, *In re Encore Capital Group, Inc.,* No. 2015–CFPB–0022 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-encore-capital-group.pdf*; Consent Order at ¶¶ 56–59, *In re Portfolio Recovery Assocs. LLC,* No. 2015–CFPB–0023 (Sept. 9, 2015), *http://files.consumerfinance.gov/f/201509_cfpb_consent-order-portfolio-recovery-associates-llc.pdf.*

[380] *See, e.g., Kimber,* 668 F. Supp. at 1489 (''By threatening to sue Kimber on her alleged debt . . . FFC implicit[ly] represented that it could recover in a lawsuit, when in fact it cannot properly do so.'').

[381] *See* FMG Focus Group Report, *supra* note 38, at 9–10; FMG Cognitive Report, *supra* note 40, at 36–37; FMG Summary Report, *supra* note 42, at 35–36; *see also* FTC Litigation Report, *supra* note 371, at iii, 26.

[382] *Phillips,* 736 F.3d at 1079 (quoting *Kimber,* 668 F. Supp. at 1487).

[383] *See* FTC Debt Buying Report, *supra* note 14, at 45 (observing that ''90 percent or more of consumers sued in [debt collection actions] do not appear in court to defend,'' which ''creates a risk that consumer will be subject to a default judgment on a time-barred debt''); Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases,* 6 J. Bus. & Tech. L. 259, 265 (2011) (''In the majority of debt buyer cases, the courts grant the debt buyer a default judgment because the consumer has failed to appear for trial. . . . Debtors

According to the small entity representatives who participated in the SBREFA process, debt collectors generally do not sue on debt they know to be time barred. Similarly, a trade association representing debt buyers has reported that, in a poll of its members, not one responded that they knowingly or intentionally file lawsuits after the applicable statute of limitations has expired.[384] During the SBREFA process, however, several small entity representatives stated that determining whether the statute of limitations has expired can be complex. The determination may involve analyzing which statute of limitations applies, when the statute of limitations began to run, and whether the statute of limitations has been tolled or reset. The Bureau believes that, in many cases, a debt collector will know, or can readily determine, whether the statute of limitations has expired. In some instances, however, a debt collector may be genuinely uncertain even after undertaking a reasonable investigation; this could occur, for example, when the case law in a State is unclear as to which statute of limitations applies to a particular type of debt.

For these reasons, the Bureau proposes to interpret FDCPA section 807 to provide that a debt collector must not bring or threaten to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt. FDCPA section 807 generally prohibits debt collectors from using ''any false, deceptive, or misleading representation or means in connection with the collection of any debt,'' and FDCPA section 807(2)(A) specifically prohibits falsely representing ''the character, amount, or legal status of any debt.'' The Bureau interprets FDCPA section 807 and 807(2)(A) to prohibit debt collectors from suing or threatening to sue consumers on debts they know or should know are time-barred debts because such suits and threats of suit explicitly or implicitly misrepresent, and may cause consumers to believe, that the debts are legally enforceable. In addition, threats to sue consumers on time-barred debts are similar to threats to take actions that cannot legally be taken, which FDCPA section 807(5) specifically prohibits, because both involve the threat of action to which the consumer has a complete legal defense. The Bureau's proposed interpretation of FDCPA section 807 is generally consistent with well-established case law holding that lawsuits and threats of lawsuits on time-barred debt violate FDCPA section 807.[385] The proposed rule may provide debt collectors with greater certainty as to what the law prohibits while also protecting consumers and enabling them to prove legal violations without having to litigate in each case whether lawsuits and threats of lawsuits on time-barred debt violate the FDCPA.

The Bureau requests comment on proposed § 1006.26(b) and on whether any additional clarification is needed. In particular, the prohibitions in proposed § 1006.26(b) would apply only if the debt collector knows or should know that the applicable statute of limitations has expired. It sometimes may be difficult, however, to determine whether a ''know or should have known'' standard has been met. Such uncertainty could increase litigation costs and make enforcement of proposed § 1006.26(b) more difficult. In part to address this concern, the Small Business Review Panel Outline described an alternative strict-liability standard pursuant to which a debt collector would be liable for suing or threatening to sue on a time-barred debt even if the debt collector neither knew nor should have known that the debt was time barred.[386] The Bureau specifically requests comment on using a ''knows or should know'' standard in proposed § 1006.26(b) and on the merits of using a strict liability standard instead.

26(c) Reserved

The Bureau is likely to propose that debt collectors must provide disclosures to consumers when collecting time-barred debts. The Bureau currently is completing its evaluation of whether consumers take away from non-litigation collection efforts that they can or may be sued on a debt and, if so, whether that take-away changes depending on the age of the debt. In many States, a consumer's partial payment on a time-barred debt or acknowledgment of a time-barred debt in writing restarts the statute of limitations period and ''revives'' the debt collector's right to sue for the full amount. The Bureau is also completing its evaluation of how a time-barred debt disclosure might affect consumers' understanding of whether debts can be revived. The disclosures under consideration include a disclosure that would inform a consumer that, because of the age of the debt, the debt collector cannot sue to recover it. They also include, where applicable, a disclosure that would inform a consumer that the right to sue on a time-barred debt can be revived in certain circumstances. The Small Business Review Panel Outline discussed certain such disclosures, and the Bureau has received feedback from stakeholders about both the need for, and the content of, such disclosures.[387]

The Bureau plans to conduct additional consumer testing of possible time-barred debt and revival disclosures, and expects this additional testing to further inform the Bureau's evaluation of any time-barred debt disclosures. At a later date, the Bureau intends to issue a report on such testing and any disclosure proposals related to the collection of time-barred debt. Stakeholders will have an opportunity to comment on such testing if the Bureau intends to use it to support disclosure requirements in a final rule. The Bureau reserves § 1006.26(c) and appendix B of the regulation for any such proposals.

Section 1006.30 Other Prohibited Practices

Proposed § 1006.30 contains several measures designed to protect consumers from certain harmful debt collection practices. Specifically, proposed § 1006.30(a) would regulate debt collectors' furnishing practices under certain circumstances; proposed § 1006.30(b) would limit the transfer of certain debts; and proposed § 1006.30(c), (d), and (e) would generally restate statutory provisions regarding allocation of payments, venue, and the furnishing of certain deceptive forms, respectively.

30(a) Communication Prior to Furnishing Information

Debt collectors may actively attempt to collect debts about which they furnish information to consumer reporting agencies by, for example,

who do receive notice usually appear without legal representation.''); CFPB Debt Collection Operations Study, *supra* note 45, at 18 (observing that respondents reported obtaining default judgments in 60 to 90 percent of their filed suits); *cf. Kimber,* 668 F. Supp. at 1487 (''Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.'').

[384] *See* David E. Reid, *Out-of-Statute Debt: What is a Smart, Balanced, and Responsible Approach,* at 8, (Receivables Mgmt. Ass'n Int'l, White Paper, 2015), *https://rmassociation.org/wp-content/uploads/2017/04/RMA_Whitepaper_OOS.pdf.*

[385] *See, e.g., Pantoja,* 852 F.3d at 683; *McMahon,* 744 F.3d at 1020; *Phillips,* 736 F.3d at 1079; *Kimber,* 668 F. Supp. at 1488–89.

[386] Small Business Review Panel Outline, *supra* note 56, at 20.

[387] *Id.* at 20–21.

calling or writing to consumers. However, some debt collectors engage in ''passive'' collections by furnishing information to consumer reporting agencies for inclusion in consumer reports without first communicating with consumers.[388] Debt collectors may attempt to collect debts passively where the expected return from that technique exceeds the cost of attempting to collect the debt by communicating with consumers.[389]

A consumer may suffer harm if a debt collector furnishes information to a consumer reporting agency without first communicating with the consumer. If debt collectors do not communicate with consumers prior to furnishing, consumers are likely to be unaware that they have a debt in collection unless they obtain and review their consumer report. In turn, many consumers may not obtain and review their consumer reports until they apply for credit, housing, employment, or another product or service provided by an entity that reviews consumer reports during the application process. At that point, consumers may face pressure to pay debts that they otherwise would dispute, including debts that they do not owe,[390] in an effort to remove the debts from their consumer reports and more quickly obtain a mortgage or job or desired product or service. Consumers unaware of the debt before a financial institution, landlord, employer, or other similar person makes a decision also may face the denial of an application, a higher interest rate, or other negative consequences.[391] If the debt collector had instead communicated with the consumer prior to furnishing by, for example, sending the consumer a validation notice, then the consumer would have been more likely to have information about the debt and to have the opportunity to resolve the debt with the debt collector by either paying or disputing it.

These consumer harms could be avoided if debt collectors communicated with consumers before furnishing information about debts in collection. The Bureau thus proposes § 1006.30(a), which provides that a debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (FCRA),[392] information regarding a debt before communicating with the consumer about the debt. Taken together with proposed § 1006.34—which generally would require debt collectors to provide consumers important information about debts at the outset of collection, including consumers' options for resolving them—proposed § 1006.30(a) should reduce the harms that result from consumers being unaware of or uninformed about their debts in collection.

During the SBREFA process, small entity representatives expressed concern over the potential burden to a debt collector of documenting, such as by using certified mail, that a consumer received a communication. The Small Business Review Panel recommended that the Bureau consider clarifying the type of communication that would be sufficient to satisfy the requirement, including clarifying that debt collectors do not need to send the validation notice by certified mail.

Proposed comment 30(a)–1 is designed to address the Panel's recommendation. Proposed comment 30(a)–1 would clarify that a debt collector would satisfy proposed § 1006.30(a)'s requirement to communicate if the debt collector conveyed information regarding a debt directly or indirectly to the consumer through any medium, but a debt collector would not satisfy the communication requirement if the debt collector attempted to communicate with the consumer but no communication occurred. For example, a debt collector communicates with the consumer if the debt collector provides a validation notice to the consumer, but a debt collector does not communicate with the consumer by leaving a limited-content message for the consumer. Proposed comment 30(a)–1 also would clarify that a debt collector may refer to proposed § 1006.42 for more information on how to provide disclosures in a manner that is reasonably expected to provide actual notice to consumers. The Bureau requests comment on proposed § 1006.30(a) and its related commentary.

The Bureau proposes § 1006.30(a) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors; its authority to interpret FDCPA section 806 regarding harassment, oppression, or abuse in connection with the collection of a debt; and its authority to interpret FDCPA section 808 regarding unfair or unconscionable means to collect or attempt to collect any debt. As discussed in part IV, a debt collector violates FDCPA section 806 if the debt collector engages in conduct that has the natural consequence of harassing, oppressing, or abusing any person in connection with the collection of a debt. A debt collector violates FDCPA section 808 if the debt collector uses unfair or unconscionable means to collect or attempt to collect any debt.

Courts have interpreted FDCPA sections 806 and 808 to prohibit certain coercive collection methods that may cause consumers to pay debts not actually owed.[393] Passive collection practices are similar to these other types of prohibited conduct because, as discussed above, they exert significant pressure in circumstances that undermine the ability of consumers to decide whether to pay debts, sometimes resulting in them paying debts they do not owe or would have otherwise disputed. The Bureau thus proposes § 1006.30(a) to prohibit a debt collector from furnishing information about a debt to consumer reporting agencies prior to communicating with the consumer about that debt, on the basis that subjecting a consumer to pressure by furnishing information to a consumer reporting agency without first providing notice to the consumer constitutes conduct that may have the natural consequence of harassment, oppression, or abuse in violation of FDCPA section 806, and that is an unfair or unconscionable means to collect or attempt to collect a debt under FDCPA section 808.

30(b) Prohibition on the Sale, Transfer, or Placement of Certain Debts

30(b)(1) In General

The sale, transfer, and placement for collection of debts that have been paid or settled or discharged in bankruptcy,

[388] *See* CFPB Medical Debt Report, *supra* note 20, at 36.

[389] *See id.*

[390] In some cases, the information furnished to consumer reporting agencies may be inaccurate. *See id.* at 51 (''Significant questions exist as to the accuracy of collections tradeline reporting.'').

[391] Such consumers generally would receive adverse action notices alerting them to the negative item on their consumer report, but these notices would occur too late to prevent the initial harm from passive collection practices. *See* 15 U.S.C. 1681m(a). Consumers who obtained credit from financial institutions also generally would have received notices that the financial institutions furnish negative information to nationwide consumer reporting agencies. *See* 15 U.S.C. 1681s–2(a)(7).

[392] 15 U.S.C. 1681a(f).

[393] *See, e.g., Fox* v. *Citicorp Credit Servs., Inc.,* 15 F.3d 1507, 1517 (9th Cir. 1994) (reversing grant of summary judgment to debt collector in part because ''a jury could rationally find'' that filing writ of garnishment was unfair or unconscionable under section 808 when debt was not delinquent); *Ferrell* v. *Midland Funding, LLC,* No. 2:15–cv–00126–JHE, 2015 WL 2450615, at *3–4 (N.D. Ala. May 22, 2015) (denying debt collector's motion to dismiss section 806 claim where debt collector allegedly initiated collection lawsuit even though it knew plaintiff did not owe debt); *Pittman* v. *J.J. Mac Intyre Co. of Nev., Inc.,* 969 F. Supp. 609, 612–13 (D. Nev. 1997) (denying debt collector's motion to dismiss claims under sections 807 and 808 where debt collector allegedly attempted to collect fully satisfied debt).

or that are subject to an identity theft report creates risk of consumer harm. If a debt is paid or settled, or discharged in bankruptcy, the debt is either extinguished or uncollectible. If a debt is listed on an identity theft report, the debt likely resulted from fraud, in which case the consumer may not have a legal obligation to repay it. Identity theft frequently results in fraudulent use of credit and often is discovered only after unauthorized account activity has occurred.[394]

Because debts that have been paid or settled or discharged in bankruptcy are either extinguished or uncollectible, and because consumers likely do not owe debts that are subject to an identity theft report, debt collectors seeking to collect such debts almost inevitably will make an express or implied false claim that consumers owe the debts. For example, in response to the ANPRM, consumer advocates noted that debt collectors who sue consumers to recover debts that were paid or settled with previous creditors may rely on an incomplete account history that does not reflect a consumer's prior payment or settlement. The FDCPA in many places reflects a concern with debt collectors collecting or attempting to collect debts that consumers likely do not owe.[395]

When the FDCPA became law in 1977, debt sales and related transfers were not common. In subsequent years, debt sales and transfers have become more frequent.[396] The general growth in debt sales and transfers may have increased the likelihood that a debt that has been paid, settled, or discharged in bankruptcy may be transferred or sold.[397] Moreover, identity theft, which has emerged as a major consumer protection concern, may increase the number of debts that are created if consumers' identities are stolen and their personal information misused.[398]

Other Federal regulators have raised similar concerns about the risk of consumer harm from the sale, transfer, and placement of these categories of debt. The FTC has considerable expertise with respect to the debt buying industry [399] and has identified a risk of consumer harm if a debt collector purchases and seeks to collect discharged debt.[400] The Office of the Comptroller of the Currency (OCC) has advised its supervised institutions that certain categories of debt—including settled debts, debts belonging to borrowers seeking bankruptcy protection, and debts incurred as a result of fraudulent activity—are not appropriate for sale because of the reputational risk and the threat of legal liability related to the unlawful tactics employed to collect these debts.[401]

Segments of the debt collection industry also appear to recognize the risks of transferring these categories of debt. Some debt collectors have adopted policies to identify and exclude certain debts from sale or transfer. For example, a trade association representing debt buyers administers a certification program that prohibits the sale of debts that have been settled in full, paid in full, or are the result of identity theft or fraud.[402]

For these reasons, proposed § 1006.30(b)(1)(i) generally would prohibit a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that the debt has been paid or settled, discharged in bankruptcy, or that an identity theft report has been filed with respect to the debt.[403] The Bureau understands that debt collectors may be required to sell or transfer such debts for non-debt collection purposes and proposes certain exceptions in § 1006.30(b)(2) to accommodate those situations. Proposed comment 30(b)(1)(i)(C)–1 provides an example clarifying that a debt collector knows or should know that an identity theft report was filed with respect to a debt if, for example, the debt collector has received a copy of the identity theft report.

The Bureau proposes § 1006.30(b)(1)(i) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, and pursuant to its authority to interpret FDCPA section 808 regarding unfair or unconscionable debt collection practices. The Bureau proposes to prohibit the sale, transfer, or placement of such debts as unfair under FDCPA section 808 on the basis that, because consumers do not owe or cannot be subject to collections on alleged debts that have been paid or settled or discharged in bankruptcy, and likely do not owe alleged debts that are subject to identity theft reports, the sale, transfer, or placement of such debts is unfair or unconscionable. Further, the sale, transfer or placement of such debts is unfair under section 1031 of the Dodd-Frank Act because it is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers where the substantial injury is not outweighed by countervailing benefits to consumers or to competition. Prohibiting the sale, transfer, or placement of such debts is reasonably designed to prevent this unfair practice.

With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in proposed § 1006.2(f), the Bureau also proposes § 1006.30(b)(1)(i) pursuant to its authority under section 1031(b) of the Dodd-Frank Act to prescribe rules to identify and prevent the commission of unfair acts or practices by Dodd-Frank Act covered persons, and the Bureau

[394] In 2014, approximately 86 percent of identity theft victims reported that their most recent incident involved unauthorized charges on an existing credit card or bank account. More than 60 percent of victims learned of the identity theft when either a financial institution notified them of suspicious activity in an account or the victim noticed fraudulent charges on an account statement. Erika Harrell, Bureau of Justice Stats., *Victims of Identity Theft, 2014,* at 2, 5, U.S. Dep't of Justice, (revised Nov. 13, 2017), *https://www.bjs.gov/content/pub/pdf/vit14.pdf.*

[395] *See, e.g.,* 15 U.S.C. 1692f(1) (prohibiting ''[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law''); *see also Jacobson* v. *Healthcare Fin. Servs., Inc.,* 516 F.3d 85, 89 (2d Cir. 2008) (quoting S. Rept. No. 382, *supra* note 70, at 4); *Fox* v. *Citicorp Credit Servs., Inc.,* 15 F.3d 1507, 1517 (9th Cir. 1994) (reversing grant of summary judgment to debt collector in part because ''a jury could rationally find'' that filing writ of garnishment was unfair or unconscionable under section 808 when debt was not delinquent); *Ferrell* v. *Midland Funding, LLC,* No. 2:15–cv–00126–JHE, 2015 WL 2450615, at *3–4 (N.D. Ala. May 22, 2015) (denying debt collector's motion to dismiss section 806 claim where debt collector allegedly initiated collection lawsuit even though it knew plaintiff did not owe debt); *Pittman* v. *J.J. Mac Intyre Co. of Nev., Inc.,* 969 F. Supp. 609, 612–13 (D. Nev. 1997) (denying debt collector's motion to dismiss claims under sections 807 and 808 where debt collector allegedly attempted to collect fully satisfied debt).

[396] In 2009, the FTC stated that the ''most significant change in the debt collection business in recent years has been the advent and growth of debt buying.'' FTC Modernization Report, *supra* note 176, at 4.

[397] *See, e.g.,* Bureau of Consumer Fin. Prot., *Supervisory Highlights, Issue No. 12,* at 6–7 (Summer 2016), *https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-no-12-summer-2016/* (discussing examinations finding that debt sellers failed to code accounts to reflect that they were in bankruptcy, the product of fraud, or settled in full).

[398] *See generally* Kristin Finklea, *Identity Theft: Trends and Issues,* Cong. Research Serv., RL40599 (2014), *https://fas.org/sgp/crs/misc/R40599.pdf.*

[399] *See generally, e.g.,* FTC Debt Buying Report, *supra* note 14.

[400] FTC Modernization Report, *supra* note 176, at 64–65.

[401] *See* Off. of the Comptroller of the Currency, Bulletin 2014–37, *Description: Risk Management Guidance* (Aug. 4, 2014), *http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.*

[402] *See* Receivables Mgmt. Ass'n Int'l, *Receivables Management Certification Program, Certification Governance Document,* at 43 (2018), *https://rmassociation.org/wp-content/uploads/2018/02/Certification-Policy-version-6.0-FINAL-20180119.pdf.* A large debt buyer also indicated in preproposal feedback that it has adopted policies to exclude certain debts from debt sales transactions.

[403] Proposed § 1006.30(b) would define ''identity theft report'' as defined in the FCRA, 15 U.S.C. 1681a(q)(4).

proposes § 1006.30(b)(1)(ii) to identify this unfair act or practice.[404] As discussed in part IV.B, to declare an act or practice unfair under Dodd-Frank Act section 1031(b), the Bureau must have a reasonable basis to conclude that: (1) The act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (2) such substantial injury is not outweighed by countervailing benefits to consumers or to competition. Selling, transferring, or placing for collection debts described in proposed § 1006.30(b)(1)(i) likely causes substantial injury to consumers because the collection of such debts likely results in deceptive claims of indebtedness and the unfair collection of amounts not owed.[405] Consumers cannot reasonably avoid this harm because they have no control over debt sales, transfers, or placements or collection activity arising subsequent to those sales, transfers or placements. The collection of debts that are either not owed or likely not owed does not benefit consumers or competition.

The Bureau requests comment on all aspects of proposed § 1006.30(b)(1). In particular, the Bureau requests comment on whether additional categories of debt, such as debt currently subject to litigation and debt lacking clear evidence of ownership, should be included in any prohibition adopted in a final rule. The Bureau also requests comment on how frequently consumers identify a specific debt when filing an identity theft report, and on how frequently debt collectors learn that an identity theft report was filed in error and proceed to sell or transfer the debt. The Bureau also requests comment on any potential disruptions that proposed § 1006.30(b)(1)(i) would cause for secured debts, such as by preventing servicing transfers or foreclosure activity related to mortgage loans. Finally, the Bureau requests comment on whether any of the currently proposed categories of debts should be clarified and, if so, how; and on whether additional clarification is needed regarding the proposed ''know or should know'' standard.

30(b)(2) Exceptions

Allowing the sale, transfer, or placement of the debts described in proposed § 1006.30(b)(1)(i) for certain bona fide business purposes other than debt collection may not create a significant risk of deceptive or unfair collections activity. Proposed § 1006.30(b)(2) sets forth four narrow exceptions to proposed § 1006.30(b)(1) to accommodate such circumstances.

Proposed § 1006.30(b)(2)(i) would allow a debt collector to transfer a debt described in proposed § 1006.30(b)(1)(i) to the debt's owner. This exception would permit a third-party debt collector who identifies such a debt among its collection accounts to return that debt to the debt's owner. Allowing a debt collector to return a debt to the debt's owner likely would not raise the risk of deceptive or unfair collections activity. Debts frequently are returned to a debt's owner after unsuccessful collections efforts.[406] Moreover, unlike a debt collector, whose overriding economic incentive is to secure a debt's repayment, certain debt owners may have other priorities that make it less likely that the owner will place the debt with another debt collector or try to collect the debt itself.[407] For creditors in particular, these moderating factors include general reputational concerns and a desire to preserve the specific customer relationship. Proposed comment 30(b)(2)(i)–1 would clarify that a debt collector may not engage in an otherwise prohibited transfer with any other entity on behalf of a debt's owner unless another exception applies.

The Bureau proposes three additional exceptions that parallel the exceptions in the FCRA to the prohibition on the sale, transfer, or placement of debt caused by identity theft.[408] Section 615(f) of the FCRA prohibits a person from selling, transferring for consideration, or placing for collection a debt after being notified that a consumer reporting agency identified that debt as having resulted from identity theft.[409] Because proposed § 1006.30(b)(1) also would prohibit the sale, transfer, or placement of debts subject to an identity theft report, the Bureau proposes to adopt the exceptions under FCRA section 615(f)(3) regarding the repurchase, securitization, or transfer of a debt as the result of a merger or acquisition, since these exceptions would appear to be equally relevant and provide some consistency between proposed Regulation F and the FCRA's existing identity theft requirements. Further, the FCRA's exceptions may provide debt collectors with sufficient flexibility to transfer debts for bona fide non-debt collection business purposes.

Proposed § 1006.30(b)(2)(ii) would allow a debt collector to transfer a debt described in proposed § 1006.30(b)(1)(i) to a previous owner if transfer is authorized by contract. Creditors may include provisions in debt sales contracts that authorize repurchase or transfer when certain issues, such as consumer disputes or identity theft, surface.[410] Such agreements may benefit debt collectors by removing non-performing debts from collection portfolios, which allows debt collectors to focus their efforts on accounts with higher recovery rates. These agreements also may benefit consumers because interactions with creditors may be less adversarial and offer speedier and fuller resolution than interactions with debt collectors.[411] The Bureau proposes § 1006.30(b)(2)(ii) to avoid impeding these agreements in debt sales contracts.

Proposed § 1006.30(b)(2)(iii) would permit a debt collector to securitize a debt described in proposed § 1006.30(b)(1)(i), or to pledge a portfolio of such debt as collateral in connection with a borrowing. The Bureau understands that, if a debt collector securitizes or pledges a portfolio of debt, the debt collector may be unable to exclude the debts described in proposed § 1006.30(b)(1)(i) from the portfolio. The Bureau proposes § 1006.30(b)(2)(iii) to allow a debt collector to securitize or pledge portfolios in connection with its own commercial borrowing without violating Regulation F.

Proposed § 1006.30(b)(2)(iv) would allow a debt collector to transfer a debt

[404] See part IV.B for a discussion of the Bureau's framework for interpreting Dodd-Frank Act section 1031(b).

[405] *Cf. Fed. Trade Comm'n* v. *Neovi, Inc.,* 604 F.3d 1150, 1157 (9th Cir. 2010) (holding that the defendant engaged in an unfair practice by creating a website that fraudsters predictably used to injure consumers).

[406] CFPB Debt Collection Operations Study, *supra* note 45, at 13.

[407] When passing the FDCPA, Congress determined that creditors ''generally are restrained by their desire to protect their good will when collecting past due accounts,'' unlike debt collectors. S. Rept. No. 382, *supra* note 70, at 2.

[408] *See* 15 U.S.C. 1681m(f)(3).

[409] *See* 15 U.S.C. 1681m(f).

[410] Creditors may include such repurchase provisions in debt sales agreements based on compliance and reputational concerns. For national banks and Federal savings associations in particular, regulatory guidance may incentivize this practice. *See, e.g.,* Off. of the Comptroller of the Currency, *Bulletin* 2014–37, *Description: Risk Management Guidance* (Aug. 4, 2014), *http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html.*

[411] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 46–47 (''Consumers reported more favorable experiences with creditors than debt collectors along many of the dimensions surveyed. About three-quarters (77 percent) of consumers who reported being contacted by a creditor, for example, said that the creditor provided accurate information compared with 49 percent of consumers contacted by a debt collector. Consumers contacted by creditors similarly were more likely to say that the creditor provided options to pay the debt, addressed their questions, and was polite. Finally, those contacted by creditors were less likely than those contacted by debt collectors to agree with less-favorable characterization of interactions such as reporting that the creditor threatened them.'').

described in proposed § 1006.30(b)(1)(i) as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector's assets. Transfers in these circumstances are not likely to raise the risk of unlawful collections activities because the transfers are for a bona fide non-debt collection business purpose. Further, excluding the categories of debt in proposed § 1006.30(b)(1)(i) from a business acquisition may be impracticable.

The Bureau requests comment on proposed § 1006.30(b)(2), including on whether additional exceptions are necessary to allow for transfers of debts for non-debt collection business purposes, and on whether the proposed exceptions should be more narrowly tailored or clarified. The Bureau also requests comment on the costs and benefits to consumers of allowing debts to be transferred under the proposed exceptions.

30(c) Multiple Debts

FDCPA section 810 provides that, if any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, that debt collector must not apply the consumer's payment to any debt which is disputed by the consumer and must apply the payment in accordance with the consumer's directions, if any.[412] Pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.30(c) to implement FDCPA section 810. Proposed § 1006.30(c) mirrors the statute, except that minor changes have been made for organization and clarity. The Bureau requests comment on proposed § 1006.30(c), including on whether additional clarification is needed.

30(d) Legal Actions by Debt Collectors

FDCPA section 811 restricts the venue in which a debt collector may initiate legal action on a debt against a consumer.[413] Pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.30(d) to implement FDCPA section 811. Proposed § 1006.30(d) mirrors the statute, except that minor changes have been made for organization and clarity. The Bureau requests comment on proposed § 1006.30(d), including on whether additional clarification is needed.

30(e) Furnishing Certain Deceptive Forms

FDCPA section 812(a) prohibits any person from knowingly designing, compiling, and furnishing any form that would be used to create the false belief in a consumer that a person other than the consumer's creditor is participating in the collection of, or in an attempt to collect, a debt the consumer allegedly owes, if in fact the creditor is not participating.[414] Pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.30(e) to implement FDCPA section 812(a). Because the Bureau's rulemaking authority under FDCPA section 814(d) is limited to debt collectors, as that term is defined in the FDCPA, proposed § 1006.30(e)'s coverage is more limited than that of FDCPA section 812(a), which applies to any person. Proposed § 1006.30(e) would not narrow coverage under the statute. Proposed § 1006.30(e) otherwise generally mirrors the statute, except that minor changes have been made for organization and clarity. The Bureau requests comment on proposed § 1006.30(e), including on whether additional clarification is needed.

Section 1006.34 Notice for Validation of Debts

FDCPA section 809(a) generally requires a debt collector to provide certain information to a consumer either at the time that, or shortly after, the debt collector first communicates with the consumer in connection with the collection of a debt. The required information—*i.e.,* the validation information—includes details about the debt and about consumer protections, such as the consumer's rights to dispute the debt and to request information about the original creditor.[415]

The requirement to provide validation information is an important component of the FDCPA and was intended to improve the debt collection process by helping consumers to recognize debts that they owe and raise concerns about debts that are unfamiliar. Congress in 1977 considered the requirement a ''significant feature'' of the statute, explaining that it was designed to ''eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'' [416] Despite the FDCPA's requirement that debt collectors provide validation information, Congress provided the Bureau with rulemaking authority in 2010 apparently to address inadequacies around validation and verification, among other things.[417] In addition, debt collectors have sought clarification about how to provide additional information consistent with the statute. For these reasons, and as discussed in more detail below, the Bureau proposes § 1006.34 to require debt collectors to provide certain validation information to consumers and to specify when and how the information must be provided.

34(a)(1) Validation Information Required

FDCPA section 809(a) provides, in relevant part, that, within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall send the consumer a written notice containing certain information, unless that information is contained in the initial communication or the consumer has paid the debt.[418] Proposed § 1006.34(a)(1) would implement and interpret this general requirement.[419]

Proposed § 1006.34(a)(1)(i) addresses situations in which the debt collector provides the validation information in writing or electronically.[420] Proposed § 1006.34(a)(1)(i) would clarify that, in those situations, a debt collector may provide the validation information by sending the consumer a validation notice either in the initial communication or within five days of that communication.[421] In either case,

[412] 15 U.S.C. 1692h.

[413] 15 U.S.C. 1692i.

[414] 15 U.S.C. 1692j.

[415] *See* 15 U.S.C. 1692g(a).

[416] S. Rept. No. 382, *supra* note 70, at 4; *see also Jacobson* v. *Healthcare Fin. Servs., Inc.,* 516 F.3d 85, 95 (2d Cir. 2008) (validation notices ''make the rights and obligations of a potentially hapless debtor as pellucid as possible''); *Wilson* v. *Quadramed Corp.,* 225 F.3d 350, 354 (3d Cir. 2000); *Miller* v. *Payco-Gen. Am. Credits, Inc.,* 943 F.2d 482, 484 (4th Cir. 1991); *Swanson* v. *S. Oregon Credit Serv., Inc.,* 869 F.2d 1222, 1225 (9th Cir. 1988).

[417] *See* S. Rept. No. 111–176, at 19 (''In addition to concerns about debt collection tactics, the Committee is concerned that consumers have little ability to dispute the validity of a debt that is being collected in error.'').

[418] *See* 15 U.S.C. 1692g(a). FDCPA section 809(a) provides that a debt collector need not send the written notice if the consumer pays the debt before the time that the notice is required to be sent. Proposed § 1006.34(a)(2) would implement that exception.

[419] Proposed § 1006.34(c) describes the validation information that proposed § 1006.34(a)(1) would require debt collectors to provide.

[420] Proposed § 1006.34(b)(4) would define a validation notice as any written or electronic notice that provides the validation information described in § 1006.34(c).

[421] Proposed § 1006.34(b)(2) provides that, with limited exceptions, initial communication means

Continued

the debt collector would be required to provide the validation notice in a manner that satisfies the delivery requirements in § 1006.42(a).[422]

Proposed § 1006.34(a)(1)(ii) would clarify that a debt collector could provide the validation information orally in the initial communication.[423] The Bureau requests comment on whether clarification regarding content and formatting requirements is needed for a debt collector who provides the validation information orally.

Proposed comment 34(a)(1)–1 would clarify the provision of validation notices if the consumer is deceased. As described in the section-by-section analysis of proposed § 1006.2(e), the failure to provide a validation notice to a person who is authorized to act on behalf of the deceased consumer's estate, such as the executor, administrator, or personal representative, may cause difficulty or delay in resolving the estate's debts. Proposed comment 34(a)(1)–1 explains that, if the debt collector knows or should know that the consumer is deceased, and if the debt collector has not previously provided the deceased consumer the validation information, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of providing a validation notice under § 1006.34(a)(1).[424] As explained in the section-by-section analysis of proposed § 1006.2(e), the Bureau proposes to interpret the term consumer to include deceased consumers.

The Bureau's interpretation of FDCPA section 809 in proposed § 1006.34(a)(1) would require a debt collector to provide the validation information when collecting debt from a deceased consumer if the debt collector has not previously provided the consumer the validation information. In such circumstances, under proposed comment 34(a)(1)–1, the debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate. If a debt collector knows or should know that the consumer is deceased, it may be unclear whether the debt collector should continue to address the validation notice to the deceased consumer, or whether the debt collector instead should address the notice to the individual who is authorized to act on behalf of the deceased consumer's estate. In light of this uncertainty, the Bureau proposes to interpret sending the validation information to a deceased consumer (*i.e.,* the deceased consumer's estate) to mean providing the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate. As explained below, this interpretation may be preferable to addressing the validation information using the name of the deceased consumer or using ''the estate of'' with the name of the deceased consumer.

Accordingly, just as a debt collector attempting to collect a debt from a living consumer generally would provide a validation notice to the consumer within five days after the initial communication with such consumer (where the validation information was not contained in the initial communication), the proposal generally would require a debt collector attempting to collect a debt from a deceased consumer's estate to provide the validation notice to the named person who is authorized to act on behalf of the deceased consumer's estate. The validation notice would have to be provided within five days after the initial communication with such person.

In its Policy Statement on Decedent Debt, the FTC expressed concern about debt collectors addressing substantive written communications to the decedent's estate, or to an unnamed executor or administrator.[425] In the FTC's experience, individuals who lack the authority to resolve the estate but who wish to be helpful are likely to open these communications, which makes such communications insufficiently targeted to a consumer with whom the debt collector may generally discuss the debt. Therefore, according to the FTC, ''communication[s] addressed to the decedent's estate, or an unnamed executor or administrator, [are] location communication[s] and must not refer to the decedent's debts.'' [426] The FTC also noted that letters addressed to deceased consumers raised similar concerns, although there may be circumstances where a debt collector neither knows nor has reason to know that the consumer has died. The Bureau agrees with these concerns. The requirement in proposed comment 34(a)(1)–1 to send any required validation notice to a named person who is authorized to act on behalf of the deceased consumer's estate would limit the practice of addressing validation notices to deceased consumers or unnamed executors, administrators, or personal representatives because a debt collector would be required to identify a person who is authorized to act on behalf of the deceased consumer's estate in order to properly direct any communication to that individual. The Bureau requests comment on the effects of any potential inconsistency between proposed comment 34(a)(1)–1 and the consumer protections that the FTC sought to achieve when it published its Policy Statement on Decedent Debt.

The Bureau proposes § 1006.34(a)(1) to implement and interpret FDCPA section 809(a) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. The Bureau requests comment on proposed § 1006.34(a)(1) and its related commentary.

34(a)(2) Exception

FDCPA section 809(a) contains a limited exception that provides that, if required information is not contained in the initial communication, a debt collector need not send the consumer a written notice within five days of the debt collector's initial communication with the consumer in connection with the collection of the debt if the consumer has paid the debt prior to the time that the notice is required to be sent.[427] Pursuant to its authority to implement and interpret FDCPA section 809(a) and its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors, the Bureau proposes § 1006.34(a)(2) to implement this exception. Proposed § 1006.34(a)(2) provides that a debt collector who

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the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, to the consumer regarding the debt.

[422] As discussed in the section-by-section analysis of proposed § 1006.42, the proposed rule would provide a general standard for the delivery of required disclosures, including the validation notice, in writing or electronically, and would clarify, among other things, how debt collectors may provide required notices to consumers by email or text message.

[423] While FDCPA section 809(a) does not prohibit a debt collector from providing validation information orally in the debt collector's initial communication, it may be impractical for debt collectors to do so given that proposed § 1006.34(c) would require a significant amount of validation information that debt collectors may not currently provide. In addition, debt collectors providing the validation information orally would not be able to use Model Form B–3 in appendix B to receive a safe harbor for compliance with § 1006.34(a).

[424] This interpretation is supported by the proposed definition of consumer, which, as discussed in the section-by-section analysis of proposed § 1006.2(e), is defined to include ''[a]ny natural person, whether living or deceased, who is obligated or allegedly obligated to pay any debt.''

[425] FTC Policy Statement on Decedent Debt, *supra* note 192.

[426] *Id.* at 44920.

[427] *See* 15 U.S.C. 1692g(a).

otherwise would be required to send a validation notice pursuant to proposed § 1006.34(a)(1)(i)(B) is not required to do so if the consumer has paid the debt prior to the time that proposed § 1006.34(a)(1)(i)(B) would require the validation notice to be sent. Proposed § 1006.34(a)(2) generally restates the statute, except for minor changes for organization and clarity.

34(b) Definitions

To facilitate compliance with § 1006.34, proposed § 1006.34(b) would define several terms that appear throughout the section. Except as discussed otherwise below, the Bureau proposes these definitions to implement and interpret FDCPA section 809(a) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

34(b)(1) Clear and Conspicuous

To facilitate compliance with proposed § 1006.34(d)(1), which would require that the validation information described in § 1006.34(c) be clear and conspicuous, proposed § 1006.34(b)(1) would define the term clear and conspicuous. The Bureau proposes to define the term clear and conspicuous for purposes of Regulation F consistent with the standards used in other consumer financial services laws and their implementing regulations, including Regulation E, subpart B (Remittance Transfers).[428] Proposed § 1006.34(b)(1) thus provides that disclosures are clear and conspicuous if they are readily understandable and, in the case of written and electronic disclosures, the location and type size are readily noticeable to consumers. Oral disclosures are clear and conspicuous if they are given at a volume and speed sufficient for a consumer to hear and comprehend them. The Bureau proposes to adopt this standard to help ensure that required disclosures, including disclosures containing validation information, are readily understandable and noticeable to consumers. Disclosures that are not clear and conspicuous will not be effective, defeating the purpose of the disclosures.

The Bureau requests comment on proposed § 1006.34(b)(1), including on whether basing the clear and conspicuous standard on existing regulations, such as Regulation E, presents any consumer protection or compliance issues, including for validation information delivered electronically or orally. The Bureau also requests comment on whether additional clarification about the meaning of clear and conspicuous would be useful in the context of the specific information that proposed § 1006.34(a)(1) would require.

34(b)(2) Initial Communication

As discussed above, FDCPA section 809(a) requires debt collectors to provide consumers with certain validation information either in the debt collector's initial communication with the consumer in connection with the collection of the debt, or within five days after that initial communication. FDCPA section 803(2) defines the term communication broadly to mean the conveying of information regarding a debt directly or indirectly to any person through any medium.[429] FDCPA section 809(d) and (e) identifies particular communications that are not initial communications with the consumer in connection with the debt for purposes of FDCPA section 809(a) and that therefore do not trigger the validation notice requirement.[430] Pursuant to FDCPA section 809(d), an initial communication excludes a communication in the form of a formal pleading in a civil action. Pursuant to FDCPA section 809(e), an initial communication also excludes the sending or delivery of any form or notice that does not relate to the collection of the debt and is expressly required by the Internal Revenue Code of 1986, title V of the Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of a data security breach or privacy, or any regulation prescribed under any such provision of law.

Proposed § 1006.34(b)(2) would implement FDCPA section 809(a), (d), and (e) by defining the term initial communication to mean the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer, other than a communication in the form of a formal pleading in a civil action, or a communication in any form or notice that does not relate to the collection of the debt and is expressly required by any of the laws referenced in FDCPA section 809(e).

The Bureau requests comment on proposed § 1006.34(b)(2) and on whether additional clarification about the term initial communication would be helpful. The Bureau specifically requests comment on the scenario in which a debt collector's first attempt to communicate with a consumer is through an electronic communication method, such as an email or a text message, and the consumer provides no response. For example, as proposed, if a debt collector sends a consumer an email notifying the consumer that a debt has been placed with the debt collector but includes no other information, the debt collector would be required to send the consumer a validation notice within five days, even if the consumer did not reply to the debt collector's email. The Bureau requests comment about the risks, costs, and benefits to industry and consumers of treating these types of debt collection communications as initial communications that would trigger § 1006.34(a)(1).

34(b)(3) Itemization Date

FDCPA section 809(a)(1) requires debt collectors to disclose to consumers, either in the debt collector's initial communication in connection with the collection of the debt, or within five days after that communication, the amount of the debt.[431] In proposed § 1006.34(c)(2)(vii) through (ix), the Bureau would interpret the phrase ''amount of the debt'' to mean that debt collectors must disclose information about the amount of the debt as of a particular ''itemization date.'' [432] To facilitate compliance with § 1006.34(c)(2)(vii) through (ix), proposed § 1006.34(b)(3) would define the term itemization date.

Account information available to debt collectors may vary by debt type because some account information is not universally tracked or used across product markets. For example, the Bureau understands that charge off is fundamental account information for credit card debt, but appears not to be applicable for some other debt types. To ensure that debt collectors working in a variety of product markets can comply with proposed § 1006.34(c)(2)(vii) through (ix), the Bureau proposes to define the term itemization date to mean any one of four reference dates for which a debt collector can ascertain the amount of the debt: (1) The last statement date, (2) the charge-off date, (3) the last payment date, or (4) the

[428] *See* 12 CFR 1005.31(a)(1), comment 31(a)(1)–1.

[429] *See* 15 U.S.C. 1692a(2). See also the section-by-section analysis of proposed § 1006.2(d).

[430] *See* 15 U.S.C. 1692g(d), (e).

[431] *See* 15 U.S.C. 1692g(a)(1).

[432] Proposed § 1006.34(c)(2)(vii) and (viii) would require debt collectors to disclose, respectively, the itemization date and the amount of the debt on the itemization date. Proposed § 1006.34(c)(2)(ix) would require debt collectors to disclose an itemization of the debt reflecting interest, fees, payments, and credits since the itemization date. For additional discussion of these provisions, see the section-by-section analysis of proposed § 1006.34(c)(2)(vii) through (ix).

transaction date.[433] As discussed further in the section-by-section analysis of proposed § 1006.34(b)(3)(i) through (iv), the proposed definition is designed to allow the use of dates that debt collectors could identify with relative ease because they reflect routine and recurring events and that correspond to notable events in the debt's history that consumers may recall or be able to verify with records. The proposed definition also is designed to include dates for which debt collectors typically may receive account information from debt owners and that, therefore, debt collectors should be able to use to provide the disclosures described in § 1006.34(c)(vii) through (ix).

Proposed comment 34(b)(3)–1 explains that a debt collector may select any of the potential reference dates listed in proposed § 1006.34(b)(3) as the itemization date to comply with § 1006.34. Once a debt collector uses one of the reference dates for a specific debt in a communication with an individual consumer, however, the debt collector would be required to use that reference date for that debt consistently when providing disclosures as proposed by § 1006.34 to that consumer. If a debt collector provides the consumer with validation information based on different reference dates for the same debt, the consumer may have difficulty recognizing the debt and be less likely to engage with the debt collector. Thus, a debt collector who used reference dates inconsistently for the same debt could undermine the purpose of proposed § 1006.34.

The Bureau's Small Business Review Panel Outline described a proposal under consideration that would have required a debt collector to provide an itemization of the debt based on a single reference date, the date of default.[434] Multiple small entity representatives expressed concern with that proposal, noting both that default has no established definition and that the default concept may be inapplicable to some debt types, such as medical debt.[435] Small entity representatives also noted that determining a date of default can involve State law interpretations that impose significant costs. Consistent with these concerns, the Small Business Review Panel Report recommended that the Bureau consider alternatives to the date of default and suggested the charge-off date, last payment date, or date of service instead.[436] Based in part on this feedback, the Bureau believes that it may be difficult to identify a single reference date that applies to all debt types across all relevant markets and, as a result, proposes to define itemization date as one of the four potential reference dates.

The Bureau requests comment on proposed § 1006.34(b)(3) and on comment 34(b)(3)–1, including on whether the itemization date definition will facilitate compliance with the requirement to disclose the validation information in § 1006.34(c)(vii) through (ix), and on whether additional clarification regarding the itemization date definition is needed. The Bureau also requests comment on whether the proposed itemization date definition would not capture certain debt types, such as mortgage debt where coupon books are provided instead of periodic statements, and on whether additional or alternative reference dates should be considered. The Bureau also requests comment on whether creditors' data management systems capture information related to the reference dates that the proposed itemization date definition would incorporate. Further, the Bureau requests comment on whether the proposed definition should mandate a single reference date, which would standardize validation notices across all relevant markets, and if so, what reference date might be suitable for all types of debt. In addition, the Bureau requests comment on how the proposed definition should function with respect to a debt that multiple debt collectors have attempted to collect. For example, the Bureau requests comment on whether a subsequent debt collector should be permitted to use a different itemization date than a prior debt collector used for the same debt.

Finally, the Bureau requests comment on whether the proposed itemization date definition should be structured as a prescriptive ordering of potential reference dates, such as a hierarchy. For example, this alternative approach could require a debt collector to determine the itemization date by identifying the first date in a hierarchy of four reference dates set forth in proposed § 1006.34(b)(3)(i) through (iv) for which a debt collector could ascertain the amount of the debt using readily available information. With respect to this alternative approach, the Bureau requests comment on whether the use of any particular reference date, such as the last statement date, is more likely than other reference dates, such as the charge-off date, to improve consumer understanding of the required disclosures. The Bureau also requests comment on whether, for purposes of a hierarchy, any particular reference date would be more likely than others to impose costs or burdens on debt collectors.

The Bureau proposes § 1006.34(b)(3), including the specific dates described in proposed § 1006.34(b)(3)(i) through (iv), pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. The Bureau also proposes § 1006.34(b)(3) pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products and services are disclosed to consumers fully, accurately, and effectively.

34(b)(3)(i)

When placing a debt for collection, creditors frequently may provide debt collectors with the last periodic or written account statements provided to consumers. Therefore, in many cases, last statement information should be readily available to debt collectors. In addition, many consumers may recall the amount of the debt on the last statement because this figure may be the most recent amount of the debt the consumer has seen, or the consumer may be able to verify that amount with their records.

For these reasons, proposed § 1006.34(b)(3)(i) would permit debt collectors to use the last statement date as the itemization date. Pursuant to proposed § 1006.34(b)(3)(i), last statement date would mean the date of the last periodic statement or written account statement or invoice provided to the consumer. Proposed comment 34(b)(3)(i)–1 explains that a statement provided by a creditor or a third party acting on the creditor's behalf, including a creditor's service provider, may constitute the last statement provided to the consumer for purposes of § 1006.34(b)(3)(i). The Bureau requests comment on proposed § 1006.34(b)(3)(i) and on comment 34(b)(3)(i)–1, including on how often creditors provide periodic statements, written statements, and invoices to debt collectors, and on whether there are specific debt types for which creditors may not provide such statements. In addition, the Bureau requests comment on whether a validation notice that a previous debt collector provided to the consumer should constitute a last statement for purposes of proposed § 1006.34(b)(3)(i).

[433] The four reference dates are set forth in proposed § 1006.34(b)(3)(i) through (iv). See the section-by-section analysis of proposed § 1006.34(b)(3)(i) through (iv).

[434] *See* Small Business Review Panel Outline, *supra* note 56, at appendix F.

[435] *See* Small Business Review Panel Report, *supra* note 57, at 18.

[436] *Id.*

34(b)(3)(ii)

When placing credit card accounts for collection, creditors frequently may provide debt collectors with account information at charge off, including the charge-off date. For this reason, some small entity representatives suggested during the SBREFA process that, for credit card debt, the Bureau should define the itemization date to mean the charge-off date.[437] Charge off is relevant to debt types other than credit cards, as well, and consumers may approximately recognize the amount of a debt due at charge off because charge off often occurs shortly after a last account statement is provided.

For these reasons, proposed § 1006.34(b)(3)(ii) would permit debt collectors to use the charge-off date—*i.e.,* the date that the debt was charged off—as the itemization date. The Bureau requests comment on proposed § 1006.34(b)(3)(ii). The Bureau generally requests comment on how often creditors provide charge-off information to debt collectors and on whether there are specific debt types for which charge off is not a relevant concept. In addition, the Bureau requests comment on whether creditors assess fees or penalties at charge off, which would cause the amount the consumer owed at charge off to differ significantly from the amount that appeared on the last periodic statement, invoice, or other written statement that the consumer received.

34(b)(3)(iii)

In some cases, creditors may provide debt collectors with account information related to a consumer's last payment. For this reason, some small entity representatives suggested during the SBREFA process that the Bureau define the itemization date to mean the last payment date.[438] Consumers also may recognize the amount of a debt that reflects the balance after the consumer's last payment.[439] Proposed § 1006.34(b)(3)(iii) thus would permit debt collectors to use the last payment date—*i.e.,* the date the last payment was applied to the debt—as the itemization date. The Bureau requests comment on proposed § 1006.34(b)(3)(iii), including on how often creditors provide debt collectors with last payment date information. The Bureau also requests comment on how proposed § 1006.34(b)(3)(iii) should be applied if a third party made the last payment on the debt. For example, such a third-party payment might include a partial payment on a consumer's medical debt by an insurance provider.

34(b)(3)(iv)

For some debt types, including for medical debt, creditors may provide debt collectors with account information related to the transaction date (*e.g.,* the date a service or good was provided to a consumer). Some small entity representatives thus suggested during the SBREFA process that the Bureau define the itemization date for medical debt to mean the date of service.[440] In addition, consumers may recognize the amount of a debt on the transaction date, which may be reflected in a copy of a contract or a bill provided by a creditor. For these reasons, proposed § 1006.34(b)(3)(iv) would permit debt collectors to use the transaction date—*i.e.,* the date of the transaction that gave rise to the debt—as the itemization date.

Proposed comment 34(b)(3)(iv)–1 explains that the transaction date is the date that a creditor provided, or made available, a good or service to a consumer and includes examples of transaction dates. The comment also explains that, if a debt has more than one potential transaction date, a debt collector may use any such date as the transaction date but must use whichever transaction date it selects consistently, as described in comment 34(b)(3)–1. The Bureau requests comment on proposed § 1006.34(b)(3)(iv) and on comment 34(b)(3)(iv)–1, including on how often creditors provide transaction date information to debt collectors and on whether the transaction date concept is inapplicable to certain debt types.

34(b)(4) Validation Notice

As already discussed, FDCPA section 809(a) provides, in relevant part, that, within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall send the consumer a written notice containing certain information, unless that information is contained in the initial communication or the consumer has paid the debt.[441] If debt collectors have provided the validation information in writing, whether in the initial communication or within five days after that communication, debt collectors and others commonly have referred to the document containing the information as a ''validation notice,'' or ''g notice.'' The Bureau understands that most debt collectors do not currently send validation notices electronically. As discussed in the section-by-section analysis of proposed § 1006.42, the Bureau proposes to clarify how debt collectors may send validation notices electronically in compliance with applicable law.

To facilitate compliance with proposed § 1006.34, as well as to account for the possibility that more debt collectors may begin providing the validation information electronically, proposed § 1006.34(b)(4) would define validation notice to mean a written or electronic notice that provides the validation information described in proposed § 1006.34(c). The Bureau requests comment on proposed § 1006.34(b)(4).

34(b)(5) Validation Period

FDCPA section 809(b) contains certain requirements that a debt collector must satisfy if a consumer disputes a debt or requests the name and address of the original creditor. If a consumer disputes a debt in writing within 30 days of receiving the validation information, a debt collector must stop collection of the debt until the debt collector obtains verification of the debt or a copy of a judgment against the consumer and mails it to the consumer.[442] Similarly, if a consumer requests the name and address of the original creditor in writing within 30 days of receiving the validation information, FDCPA section 809(b) requires the debt collector to cease collection of the debt until it obtains and mails such information to the consumer.[443] FDCPA section 809(b) also prohibits a debt collector, during the 30-day period consumers have to dispute a debt or request information about the original creditor, from engaging in collection activities and communications that overshadow, or are inconsistent with, the disclosure of the consumer's rights to dispute the debt and request original-creditor information, which are sometimes referred to as ''verification rights.''[444]

As described in the section-by-section analysis of § 1006.34(c)(3)(i) through (iii), the proposed rule would require debt collectors to disclose to a consumer the date certain on which the consumer's FDCPA section 809(b) verification rights expire. Without additional clarification, debt collectors may be uncertain how to calculate this

[437] *Id.*

[438] *Id.*

[439] *See* FMG Focus Group Report, *supra* note 38, at 20–21.

[440] Small Business Review Panel Report, *supra* note 57, at 18.

[441] *See* 15 U.S.C. 1692g(a).

[442] 15 U.S.C. 1692g(b).

[443] *See id.* The Bureau refers to the consumer's rights to dispute the validity of the debt and to request original-creditor information collectively as the consumer's ''verification rights.''

[444] *Id.*

date certain. First, debt collectors may be unsure how to reliably determine when a consumer has received the validation information (*i.e.,* the event that triggers the running of the 30-day period). In addition, some debt collectors may honor disputes and original-creditor information requests that a consumer provides after the 30-day period to dispute a debt or request information about the original creditor set forth in the FDCPA expires and may benefit from clarification about how to specify a longer period.

To facilitate compliance with the proposed requirement to provide the date certain on which the consumer's verification rights expire, proposed § 1006.34(b)(5) would define the term validation period to mean the period starting on the date that a debt collector provides the validation information described in § 1006.34(c) and ending 30 days after the consumer receives or is assumed to receive the validation information. To clarify how to calculate the end of the validation period—including how debt collectors may disclose a period that provides consumers additional time to exercise their validation rights—proposed § 1006.34(b)(5) also would provide that a debt collector may assume that a consumer receives validation information on any day that is at least five days (excluding legal public holidays, Saturdays, and Sundays) after the debt collector provides it. Proposed § 1006.34(b)(5) is designed to provide a debt collector with a straightforward yet flexible way to determine the last date of the validation period referenced in § 1006.34(c)(3)(i) through (iii). The Bureau proposes § 1006.34(b)(5) on the basis that consumers will typically receive a validation notice no more than five days (excluding legal public holidays, Saturdays, and Sundays) after the debt collector provides it. Further, proposed § 1006.34 would not prohibit a debt collector from honoring a consumer's request to exercise verification rights after the date certain that appears in the validation notice pursuant to § 1006.34(c)(3)(i) through (iii).

Proposed comment 34(b)(5)–1 would clarify that, if a debt collector sends a subsequent validation notice to a consumer because the consumer did not receive the original validation notice, and the consumer has not otherwise received the validation information, the debt collector must calculate the end of the validation period based on the date the consumer receives or is assumed to receive the subsequent validation notice. In other words, proposed comment 34(b)(5)–1 would clarify that, if a debt collector sends an initial validation notice that was not received and then sends a subsequent validation notice, the validation period ends 30 days after the consumer receives or is assumed to receive the subsequent validation notice.

The Bureau requests comment on proposed § 1006.34(b)(5) and on comment 34(b)(5)–1. In particular, the Bureau requests comment on debt collectors' current practices for determining the end of the validation period. The Bureau also requests comment on whether the length of the five-day timing presumption should be modified and on whether different timing presumptions should apply depending on whether a validation notice is delivered by mail or electronically, for example by email or text message. Finally, the Bureau requests comment on whether a different timing presumption should apply if validation information is provided orally.

34(c) Validation Information

Proposed § 1006.34(c) sets forth the validation information that debt collectors would be required to disclose under § 1006.34(a)(1). As described below, the validation information that proposed § 1006.34(c) would require consists of four general categories: Information to help consumers identify debts (including the information specifically referenced in FDCPA section 809(a)); information about consumers' protections in debt collection; information to facilitate consumers' ability to exercise their rights with respect to debt collection; and certain other statutorily required information.

34(c)(1) Debt Collector Communication Disclosure

FDCPA section 807(11) requires a debt collector to disclose in its initial written communication with a consumer—and if the initial communication is oral, in that oral communication as well—that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. FDCPA section 807(11) also requires a debt collector to disclose in each subsequent communication that the communication is from a debt collector.[445] As discussed above, the Bureau proposes the § 1006.18(e) disclosure to implement FDCPA section 807(11). If a debt collector provides validation information, the debt collector engages in a debt collection communication and must make an appropriate FDCPA section 807(11) disclosure.[446] The Bureau proposes § 1006.34(c)(1) to provide that the § 1006.18(e) disclosure is validation information that must be provided to the consumer pursuant to § 1006.34(a)(1). The Bureau requests comment on proposed § 1006.34(c)(1).

34(c)(2) Information About the Debt

While validation notices in use today typically contain the specific information required under FDCPA section 809(a), the Bureau understands that debt collectors often do not include any other information to help consumers identify debts.[447] As a result, validation notices in use today may lack sufficient information to enable some consumers to exercise their FDCPA section 809 rights. For example, the Bureau's qualitative consumer research indicates that certain information that appears to help consumers to recognize a debt—including a debt's original account number or an itemization of interest and fees—may not consistently appear on validation notices.[448] Complaints about insufficient information to verify debts consistently rank among the most frequent types of consumer debt collection complaints received by the Bureau.[449] Further, validation notices in use today may not be written in plain language that promotes consumer understanding. Thus, in some cases, consumers may not understand information about the debt that appears on the validation notice.

The Bureau's understanding is consistent with FTC findings, as well as with consumer advocate and industry feedback. According to the FTC, debt collectors do not provide sufficient information to allow consumers to determine whether they owe a debt in question or to exercise their FDCPA rights.[450] Observing that validation notices lack sufficient detail for consumers to recognize whether a debt belongs to them, the FTC has suggested that more information about the debt

[445] See the section-by-section analysis of proposed § 1006.18(e).

[446] *See, e.g., Dorsey* v. *Morgan,* 760 F. Supp. 509 (D. Md. 1991).

[447] *See* Small Business Review Panel Outline, *supra* note 56, at 15.

[448] *See* FMG Cognitive Report, *supra* note 40, at 8–11.

[449] In its 2019 FDCPA Annual Report, the Bureau noted that 72 percent of consumers who complain about written notifications about debt stated that they did not receive enough information to verify the debt. 2019 FDCPA Annual Report, *supra* note 11, at 17. Consumers have consistently complained to the Bureau about receiving insufficient information to verify debts. *See* 2018 FDCPA Annual Report, *supra* note 16, at 15–16; 2017 FDCPA Annual Report, *supra* note 21, at 16.

[450] FTC Modernization Report, *supra* note 176, at 21.

should appear in validation notices.[451] In response to the Bureau's ANPRM, consumer advocates stated that many validation notices contain insufficient information for consumers to evaluate whether they owe a debt. Industry commenters also identified additional information for validation notices that would help consumers recognize debts, such as the date of the consumer's last payment and itemization information.

The lack of information about the debt currently provided in validation notices—combined with limited disclosure of consumers' rights with respect to debt collection, which is discussed in the section-by-section analysis of proposed § 1006.34(c)(3)—may disadvantage both consumers and debt collectors. If a consumer receives a validation notice for an unfamiliar debt, the consumer may experience uncertainty, which may lead to the consumer disputing a debt that is owed. If a consumer disputes a debt the consumer owes but does not recognize, the debt collector must spend time and resources responding to a dispute that could have been avoided had the consumer initially received more complete information. Participants in the Bureau's consumer testing also reported that the inability to recognize a debt is a major concern because of the risk of potential fraud or identity theft.[452] In addition, a consumer may, in some instances, pay an unfamiliar debt that the consumer did not owe.[453]

In light of these concerns, proposed § 1006.34(c)(2) would describe the information about the debt and the parties related to the debt that debt collectors must provide to the consumer under § 1006.34(a)(1).[454] The section-by-section analysis of proposed § 1006.34(c)(2)(i) through (x) discusses the specific items of information, which would include existing statutory disclosures, designed to help consumers recognize debts. Except where noted—for example, in the case of merchant brand information for credit card debt under proposed § 1006.34(c)(2)(iii)—the information described in proposed § 1006.34(c) is not conditioned on availability. Thus, if a debt collector does not have a piece of information for a debt, the debt collector would be unable able to comply with proposed § 1006.34(a)(1) for that debt.

The Bureau requests comment on proposed § 1006.34(c)(2), including on whether any of the proposed items should be excluded or any additional items should be added. The Bureau also requests comments on whether proposed § 1006.34(c)(2)'s content requirements risk overwhelming consumers and decreasing their understanding, thereby making the proposed disclosures less effective.

Except with respect to § 1006.34(c)(2)(iv), the Bureau proposes § 1006.34(c)(2) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and, as described more fully below, its authority to implement and interpret FDCPA section 809. Except with respect to § 1006.34(c)(2)(vi) and (x), the Bureau also proposes § 1006.34(c)(2) pursuant to its authority under section 1032(a) of the Dodd-Frank Act, on the basis that the validation information describes the debt, which is a feature of debt collection. Requiring disclosure of validation information may help to ensure that the features of debt collection are fully, accurately, and effectively disclosed to consumers, such that consumers may better understand whether they owe particular debts and, consequently, the costs, benefits, and risks associated with paying or not paying those debts.

34(c)(2)(i)

FDCPA section 809(b) provides that a consumer may notify a debt collector in writing, within 30 days after receipt of the information required by FDCPA section 809(a), that the consumer is exercising certain verification rights, including the right to dispute the debt. FDCPA section 809(a)(3) through (5), in turn, requires debt collectors to disclose how consumers may exercise their verification rights. To notify a debt collector in writing that the consumer is exercising the consumer's verification rights, the consumer must have the debt collector's name and address.[455] For this reason, and pursuant to its authority to interpret FDCPA section 809(a)(3) through (5) and (b), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(i) to provide that the debt collector's name and mailing address is validation information that must be provided to the consumer under § 1006.34(a)(1). The Bureau requests comment on proposed § 1006.34(c)(2)(i) and on whether additional clarification would be useful.

34(c)(2)(ii)

FDCPA section 809(a) requires debt collectors to disclose information about the debt itself that helps consumers identify the debt and facilitate resolution of the debt. Like the information specifically referenced in FDCPA section 809(a), the consumer's name and address is essential information about the debt that may help a consumer determine whether the consumer owes a debt and is the intended recipient of a validation notice. For this reason, and pursuant to its authority to interpret FDCPA section 809(a), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(ii) to provide that the consumer's name and mailing address is validation information that must be provided to the consumer under § 1006.34(a)(1).[456]

To avoid confusing or misleading consumers, the consumer's name and mailing address used by the debt collector in a validation notice would be the most complete information that the debt collector obtained from the creditor or another source. For example, a consumer advocate has noted that including the consumer's complete name in the validation notice would help senior consumers who may be contacted about a debt owed by a spouse or an adult child. Because a consumer may share the same last name as a spouse or an adult child, the consumer may need complete name information—for example, a name suffix such as ''Junior'' or ''Senior''—to determine whether the consumer is the

[451] *Id.* at 29.

[452] FMG Focus Group Report, *supra* note 38, at 13.

[453] Academic research and agency experience offer insight into why some consumers may pay debts that they do not owe in response to debt collection efforts. In one study of how consumers would react to a validation notice concerning a debt that they did not owe, 3 percent of respondents stated that they would pay the debt rather than dispute it. The study's authors hypothesized that fear of negative credit reporting may explain this behavior. *See* Jeff Sovern et al., *Validation and Verification Vignettes: More Results from an Empirical Study of Consumer Understanding of Debt Collection Validation Notices,* Rutgers L. Rev. (forthcoming) (manuscript at 46–47), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219171.* In a settlement agreement with a debt collector, the FTC alleged that many consumers paid purported debts that they did not owe because they believed that the debts were real, or because they wanted to stop harassing debt collection efforts. *See* Complaint at ¶ 22, *Fed. Trade Comm'n* v. *Lombardo Daniels & Moss, LLC.* No. 3:17–CV–503–RJC (W.D.N.C. Aug. 21, 2017), *https://www.ftc.gov/system/files/documents/cases/lombardo_complaint_8-29-17.pdf.*

[454] Proposed § 1006.34(c)(5) would establish a special rule for information about the debt for certain residential mortgage debt.

[455] Participants in the Bureau's consumer testing reported that contact information for debt collectors, including the debt collector's mailing address, is important. FMG Focus Group Report, *supra* note 38, at 15–16.

[456] As discussed in part VI, debt collectors may already include the consumer's complete name information available on validation notices, so proposed § 1006.34(c)(2)(ii) may not pose significant operational challenges.

validation notice's intended recipient, or whether the consumer received the validation notice in error. Proposed comment 34(c)(2)(ii)–1 therefore would clarify that the consumer's name should reflect what the debt collector reasonably determines is the most complete version of the name information about which the debt collector has knowledge, whether obtained from the creditor or another source. Proposed comment 34(c)(2)(ii)–1 further explains that a debt collector would not be able to omit name information in a manner that would create a false, misleading, or confusing impression about the consumer's identity.

The Bureau requests comment on proposed § 1006.34(c)(2)(ii) and on comment 34(c)(2)(ii)–1, including on whether additional clarification would be useful. The Bureau specifically requests comment on how debt collectors currently determine the complete version of a consumer's name if creditors or third parties, such as a skip tracing vendors, provide conflicting name information. The Bureau also requests comment on what a debt collector should be required to do to reasonably determine the consumer's complete name information.

34(c)(2)(iii)

The purpose of FDCPA section 809 is to ''eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'' [457] Consistent with this purpose, FDCPA section 809(a) requires debt collectors to disclose to consumers certain information, including the name of the creditor, to help consumers identify debts and determine whether they owe them. For credit card debts, the merchant brand appears to be an integral part of the name of the creditor that helps consumers identify debts and determine whether they owe them. Merchant brands appear to be salient information for debts arising from use of co-branded or private-label credit cards because consumers may associate such debts more closely with merchant brands than with credit card issuers.[458] For example, the Bureau's consumer focus group findings indicate consumers use merchant brands to recognize credit card debts.[459]

For this reason, and pursuant to its authority to interpret FDCPA section 809(a), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(iii) to provide that the merchant brand, if any, associated with a credit card debt, to the extent available to the debt collector, is validation information that must be provided to the consumer under § 1006.34(a)(1). Proposed comment 34(c)(2)(iii)–1 provides an example of merchant brand information that the Bureau believes would be available to a debt collector and must be included on a validation notice. The Bureau requests comment on proposed § 1006.34(c)(2)(iii) and on comment 34(c)(2)(iii)–1. In particular, the Bureau requests comment on whether merchant brand or similar information should be required for debts other than credit card debts.

34(c)(2)(iv)

FDCPA section 809(a)(2), which requires debt collectors to disclose to consumers the name of the creditor to whom the debt is owed, typically is understood to refer to the current creditor.[460] When the original creditor (or the creditor as of the itemization date) and the current creditor are the same, a consumer is more likely to recognize the creditor's name. If they are different, however, a consumer may be less likely to recognize the current creditor. For example, after the itemization date, a creditor may have sold a debt to a debt buyer, or may have changed its corporate identity following a merger or acquisition, and the consumer may not have had any contact with the new entity before collections began. In these cases, the consumer may be more likely to recognize the name of the creditor as of the itemization date than the name of the current creditor. This is because (as discussed in the section-by-section analysis of proposed § 1006.34(b)(3)) the itemization date is intended to reflect a notable event in a debt's history that the consumer may recall, or for which the consumer may have records. A consumer may be more likely to recognize the creditor as of that date than the current creditor, with whom the consumer may have no prior relationship.

For these reasons, and pursuant to its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(iv) to provide that, if a debt collector is collecting a consumer financial product or service debt, as that term is defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date is validation information that the debt collector must provide to the consumer under § 1006.34(a)(1). The Bureau requests comment on proposed § 1006.34(c)(2)(iv).

34(c)(2)(v)

The purpose of FDCPA section 809 is to ''eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid.'' [461] The Bureau believes that the problem of debt collectors attempting to collect debts from consumers who do not owe the debts continues today. For example, ''attempts to collect debt not owed'' is consistently the most common type of debt collection complaint consumers provide to the Bureau.[462]

Consistent with the FDCPA's purpose, FDCPA section 809(a) requires debt collectors to disclose to consumers certain information, such as the amount of the debt itself, to help consumers identify debts. An account number associated with a debt on the itemization date may be integral information that a consumer uses to identify the debt itself. For example, the Bureau's consumer testing suggests that a validation notice that includes an account number appears to ease concerns that a debt is fraudulent because the consumer may recognize the number or be able to verify the debt with their records.[463] In addition, in response to the Bureau's ANPRM, State attorneys general, consumer advocates, and industry stakeholders all provided feedback that the account number associated with a debt may help a consumer recognize the debt. For these reasons, and pursuant to its authority to interpret FDCPA section 809(a), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(v) to provide that the account number, if any, associated with the debt on the itemization date, or a

[457] S. Rept. No. 382, *supra* note 70, at 4.

[458] The Bureau believes that merchant brand information is unique to credit card debt. Other types of debt do not typically involve an entity like a merchant, whom the consumer may associate with the debt but who did not provide the credit, product, or service that gave rise to the debt.

[459] FMG Focus Group Report, *supra* note 38, at 13–14; FMG Usability Report, *supra* note 41, at 43–44.

[460] See the section-by-section analysis of proposed § 1006.34(c)(2)(vi) regarding FDCPA section 809(a)(2)'s requirement to disclose the name of the creditor to whom the debt is owed.

[461] S. Rept. No. 382, *supra* note 70, at 4.

[462] *See* 2019 FDCPA Annual Report, *supra* note 11, at 16 (40 percent of consumer complaints about debt collection involve attempts to collect debt not owed); 2018 FDCPA Annual Report, *supra* note 16, at 15 (39 percent of consumer complaints about debt collection involve attempts to collect debt not owed).

[463] FMG Focus Group Report, *supra* note 38, at 19.

truncated version of that number, is validation information that the debt collector must provide to the consumer under § 1006.34(a)(1).

Debt collectors may wish to truncate account numbers to prevent disclosure of consumer account information, or to comply with applicable privacy rules, such as the FTC Safeguards Rule.[464] Proposed comment 34(c)(2)(v)–1 explains that debt collectors may do so provided that the account number remains recognizable. For example, in lieu of disclosing a complete account number, debt collectors may disclose only the last four digits of the number. The Bureau requests comment on proposed § 1006.34(c)(2)(v) and on comment 34(c)(2)(v)–1, including on whether the Bureau should mandate truncation of account numbers rather than making truncation optional. Further, the Bureau requests comment on whether additional clarification about truncation would be helpful. For example, such clarification might explain when a truncated account number is recognizable, or how debt collectors may indicate that digits have been omitted from a truncated account number.

34(c)(2)(vi)

FDCPA section 809(a)(2) requires debt collectors to disclose to consumers the name of the creditor to whom the debt is owed. By using the present tense ''is owed,'' the statute appears to refer to the creditor to whom the debt is owed when the debt collector makes the disclosure. For this reason, and pursuant to its authority to implement and interpret FDCPA section 809(a)(2), the Bureau proposes § 1006.34(c)(2)(vi) to provide that the name of the current creditor is validation information that the debt collector must provide to the consumer under § 1006.34(a)(1).

34(c)(2)(vii)

FDCPA section 809(a)(1) requires debt collectors to disclose to consumers the amount of the debt. In § 1006.34(c)(2)(viii), the Bureau proposes to interpret FDCPA section 809(a)(1), and to use its authority under Dodd-Frank Act section 1032(a), to provide that the amount of the debt on the itemization date is validation information that the debt collector must disclose under § 1006.34(a)(1).[465] Consistent with proposed § 1006.34(c)(2)(viii)—and for the same reasons and pursuant to the same authority discussed in the section-by-section analysis thereof—the Bureau proposes § 1006.34(c)(2)(vii) to provide that the itemization date, as defined in § 1006.34(b)(3), also is validation information that must be provided to the consumer under § 1006.34(a)(1).[466] The itemization date would indicate the beginning of the time period that the itemization of the debt in proposed § 1006.34(c)(2)(ix) is intended to capture. The Bureau requests comment on proposed § 1006.34(c)(2)(vii).

34(c)(2)(viii)

FDCPA section 809(a)(1) requires debt collectors to disclose to consumers the amount of the debt. The phrase ''the amount of the debt'' is ambiguous; it does not specify which debt amount is being referred to, even though the debt amount may change over time. For example, because of accrued interest or fees, the current amount of the debt (*i.e.,* the amount on the date that the validation information is provided) may be more than the amount of the debt at origination. Because of applied payments or credits, the current amount of the debt also may be less than the amount of the debt the consumer originally incurred. If the amount of the debt has changed over time, consumers may not recognize the debt or the current amount of the debt. By contrast, consumers may recognize the amount of the debt as of the itemization date. As discussed in the section-by-section analysis of proposed § 1006.34(b)(3), the itemization date reflects a notable event in a debt's history that a consumer may recall or be able to verify with records, particularly if that amount is itemized as described in § 1006.34(c)(ix).

Because the amount of the debt on the itemization date may help a consumer recognize a debt and determine whether the amount of a debt is accurate, the Bureau proposes to interpret FDCPA section 809(a)(1), and to use its authority under Dodd-Frank Act section 1032(a), to provide in § 1006.34(c)(2)(viii) that the amount of the debt on the itemization date is validation information that the debt collector must provide to the consumer under § 1006.34(a)(1).[467] Proposed comment 34(c)(2)(viii)–1 explains that this amount includes any fees, interest, or other charges owed as of the itemization date. The Bureau requests comment on proposed § 1006.34(c)(2)(viii) and on comment 34(c)(2)(viii)–1.

34(c)(2)(ix)

FDCPA section 809(a)(1) requires a debt collector to disclose to consumers the amount of the debt. This disclosure is intended to help consumers recognize debts that they owe and raise concerns about debts that are unfamiliar or inaccurate. For the reasons discussed in the section-by-section analysis of proposed § 1006.34(c)(2)(viii) and (x), the Bureau proposes to implement and interpret FDCPA section 809(a)(1) to provide that debt collectors must disclose to consumers both the amount of the debt on the itemization date and the current amount of the debt (*i.e.,* the amount of the debt on the date that the validation information is provided).

In conjunction with the amount of the debt on the itemization date and the current amount of the debt, an itemization of how the amount of the debt changed between those dates may be an integral part of the amount of the debt. Specifically, consumers may be better positioned to recognize whether they owe a debt and to evaluate whether the current amount alleged due is accurate if they understand how the amount changed over time due, for example, to interest, fees, payments, and credits that have been assessed or applied to the debt.

The Bureau's qualitative consumer testing indicates that an itemization appears to improve consumer understanding about and recognition of the debt.[468] In particular, some testing participants emphasized that an itemization in a tabular format helped them understand specific fees and charges.[469] The FTC has also suggested that the validation notice should contain an itemization that includes principal, interest, and fees.[470] Some State debt collection laws also require that the validation notice include an itemization.[471]

Courts have also observed that an itemization may enhance consumer understanding. Some courts have opined that an itemized accounting helps a consumer assess the validity of

[464] *See* 16 CFR part 314.

[465] See the section-by-section analysis of proposed § 1006.34(c)(2)(viii).

[466] As discussed in the section-by-section analysis of proposed § 1006.34(b)(3) and (c)(2)(viii) and (ix), the itemization date is the reference date for, among other things, the itemization of the debt, which the Bureau believes may help a consumer identify an alleged debt. For additional discussion of these provisions, see the section-by-section analysis of proposed § 1006.34(c)(2)(iv) and (v).

[467] Proposed § 1006.34(c)(2)(x) separately provides that the current amount of the debt also is validation information that must be disclosed under § 1006.34(a)(1). See the section-by-section analysis of proposed § 1006.34(c)(2)(x).

[468] FMG Usability Report, *supra* note 41, at 16–19.

[469] FMG Cognitive Report, *supra* note 40, at 10.

[470] FTC Modernization Report, *supra* note 176, at v.

[471] *See* Cal. Civ. Code sec. 1788.52(a)(2); NYCRR § 1.2(b)(2).

an alleged debt.[472] Further, some courts have held that a debt collector's failure to properly disclose interest and fees—or to disclose that a debt may increase in the future due to interest and fees—may violate the FDCPA.[473]

An itemization also may discourage debt collectors from engaging in unfair, deceptive, or abusive practices by ensuring that consumers have, as a matter of course, sufficient information to evaluate claims of indebtedness presented in validation notices. For example, requiring a debt collector to disclose an itemization of the debt may help a consumer identify erroneous or fabricated fees that a creditor or debt collector may have added that inflated the amount of an alleged debt. An itemization requirement also may help debt collectors disclose interest and fees in a manner that provides essential information to consumers and reduces debt collectors' legal risk when providing validation notices.

For these reasons, and pursuant to its authority to interpret FDCPA section 809(a)(1), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(2)(ix) to provide that an itemization of the current amount of the debt, in a tabular format reflecting interest, fees, payments, and credits since the itemization date, is validation information that must be provided to the consumer under § 1006.34(a)(1). Proposed comment 34(c)(2)(ix)–1 would clarify how debt collectors can disclose that no interest, fees, payments, or credits were assessed or applied to a debt.

The Bureau requests comment on proposed § 1006.34(c)(2)(ix) and on comment 34(c)(2)(ix)–1. In particular, the Bureau requests comment on whether the itemization should be more detailed—for example, by reflecting each fee charged and each payment received—or whether certain itemization categories, such as credits and payments, should be combined. The Bureau also requests comment on whether the itemization proposal is practicable across all categories of debt or conflicts with disclosure requirements established by other applicable law, such as State case law, statutory law, and regulatory law, as well as disclosures required by judicial opinions or orders.

34(c)(2)(x)

FDCPA section 809(a)(1) requires debt collectors to disclose to consumers the amount of the debt. As noted, however, the phrase ''the amount of the debt'' is ambiguous; it does not specify which debt amount is being referred to, even though the debt amount may change over time. One reasonable interpretation of FDCPA section 809(a)(1) is that ''amount of the debt'' refers to the current amount of the debt, which is the amount of the debt on the date that the validation information is provided. For this reason, and pursuant to its authority to implement and interpret FDCPA section 809(a)(1), proposed § 1006.34(c)(2)(x) provides that the current amount of the debt is validation information that the debt collector must provide to the consumer under § 1006.34(a)(1).

Proposed comment 34(c)(2)(x)–1 explains that, for residential mortgage debt subject to § 1006.34(c)(5), a debt collector may comply with § 1006.34(c)(2)(x) by including in the validation notice the total balance of the outstanding mortgage, including principal, interest, fees, and other charges. The Bureau proposes this to accommodate debt collectors collecting mortgage debt, who sometimes disclose to consumers the total balance of the outstanding mortgage, rather than the current amount due on a given date when providing the amount of the debt pursuant to FDCPA section 809(a)(1).[474] The Bureau requests comment on proposed § 1006.34(c)(2)(x) and on comment 34(c)(2)(x)–1.

34(c)(3) Information About Consumer Protections

The disclosures in FDCPA section 809(a) help consumers determine if a particular debt is theirs and facilitate action in response to a collection attempt. The Bureau understands, however, that debt collectors typically may disclose only the information that FDCPA section 809(a) specifically references and may provide the FDCPA section 809 information using statutory language, rather than plain language that consumers can more easily comprehend.

Consumer advocates, State agencies, and State attorneys general provided ANPRM feedback that validation notices do not contain enough information about a consumer's rights with respect to debt collection.[475] The FTC similarly has asserted that debt collectors generally do not provide enough information about the actions consumers may take under the FDCPA, which makes it difficult for some consumers to exercise those rights.[476] The Bureau's consumer focus group findings also indicate that consumers often are unfamiliar with or have erroneous beliefs about their FDCPA rights.[477] Many testing participants responded favorably to sample validation notices that disclosed additional rights and protections.[478] Consumer testing also suggests that consumers generally prefer disclosures written in plain language, as opposed to statutory language.[479]

To address these concerns, proposed § 1006.34(c)(3) would deem certain information about a consumer's rights with respect to debt collection to be validation information that must be provided to the consumer under § 1006.34(a)(1). This information, which is discussed in the section-by-section analysis of proposed § 1006.34(c)(3)(i) through (vi), would include disclosures specifically referenced in FDCPA

[472] *See, e.g., Haddad* v. *Alexander, Zelmanski, Danner & Fioritto, PLLC,* 758 F. 3d 777, 785 (6th Cir. 2015).

[473] *See Avila* v. *Riexinger & Associates, LLC,* 817 F.3d 72, 76 (2d Cir. 2016) (holding that 15 U.S.C. 1692e requires debt collectors to disclose when the amount of a debt may increase due to interest and fees); *Miller* v. *McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC,* 214 F.3d 872, 875–76 (7th Cir. 2000) (finding that a validation notice's omission of accrued interest and fees violated 15 U.S.C. 1692g(a)(1)'s requirement to disclose the amount of the debt); *Wood* v. *Allied Interstate, LLC* (17 C 4921), 2018 WL 2967061, at *2–3 (N.D. Ill. June 13, 2018) (holding that an itemization that listed ''$0.00'' due in interest and fees, when interest and fees were not allowed, could violate 15 U.S.C. 1692e and 1692f).

[474] Under Regulation Z, 12 CFR 1026.41(d)(3), certain mortgage servicers are required to provide a past-payment breakdown that may be functionally equivalent to, and as useful for the consumer, as the disclosures that would be required by proposed § 1006.34(c)(2)(vii) through (ix). As discussed in the section-by-section analysis of proposed § 1006.34(c)(5), the Bureau proposes a special rule that would allow servicers of certain residential mortgage debt to satisfy the requirements of proposed § 1006.34(c)(2)(vii) through (ix) by providing disclosures required by Regulation Z, 12 CFR 1026.41(d)(3).

[475] Consumer complaints received by the Bureau tend to corroborate this feedback. In its 2019 FDCPA Annual Report, the Bureau noted that 25 percent of consumers who complained about written notifications about debt stated that they did not receive a notice of their right to dispute. *See* 2019 FDCPA Annual Report, *supra* note 11, at 17.

[476] FTC Modernization Report, *supra* note 176, at v. The notion that some consumers may have difficulty exercising FDCPA verification rights is supported by one academic study that found a substantial proportion of survey respondents did not understand they would need to dispute a debt in writing to trigger certain FDCPA protections. According to the study, 75 percent of consumers who were shown a court-approved validation notice believed that they could orally exercise their verification rights, even though the notice expressly stated that disputes must be in writing. *See* Jeff Sovern & Kate E. Walton, ''Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices,'' 70 SMU L. Rev. 63, at 94–98 (2017).

[477] FMG Focus Group Report, *supra* note 38, at 6–8.

[478] FMG Cognitive Report, *supra* note 40, at 27–33.

[479] *Id.* at 26–27; FMG Summary Report, *supra* note 42, at 25–26.

section 809(a)(4) and (5), as well as additional disclosures intended to help consumers understand their debt collection rights.[480] The Bureau requests comment on proposed § 1006.34(c)(3) generally, including on whether any of the proposed items should be excluded or any additional items should be added.

The Bureau proposes § 1006.34(c)(3)(i) through (iii) and (v) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and, as described more fully below, its authority to implement and interpret FDCPA section 809. The Bureau also proposes § 1006.34(c)(3) pursuant to its authority under section 1032(a) of the Dodd-Frank Act, on the basis that a consumer's rights are a feature of debt collection. Requiring disclosure of information about these rights may help to ensure that the features of debt collection are fully, accurately, and effectively disclosed to consumers, such that consumers may better understand the costs, benefits, and risks associated with debt collection.

34(c)(3)(i)

FDCPA section 809(a)(4) requires debt collectors to disclose to consumers their right under FDCPA section 809(b) to dispute the validity of the debt within 30 days after receipt of the validation information (*i.e.,* during the validation period). As discussed in the section-by-section analysis of proposed § 1006.38, if a consumer disputes a debt in accordance with FDCPA section 809(b), a debt collector must cease collecting the debt until the debt collector provides verification to the consumer; this is sometimes referred to as the collections pause. FDCPA section 809(a)(4) does not expressly indicate that a debt collector must disclose to consumers that a dispute triggers FDCPA section 809(b)'s collections pause, or whether a debt collector must disclose the end date of the validation period.

FDCPA section 809(b)'s collections pause is an integral feature of the dispute right disclosure required by FDCPA section 809(a)(4). Unless debt collectors disclose the collections pause, consumers may not fully appreciate their FDCPA dispute right. Participants in the Bureau's consumer testing reported that knowing about the collections pause was important and would encourage them to exercise their dispute right if they question a debt's validity.[481] This is consistent with the FTC's observation that consumers are generally unaware of the collections pause, even though it may benefit them.[482]

The validation period end date similarly is an integral feature of a consumer's dispute right. Unless debt collectors disclose the end date of the validation period, consumers may be uncertain about the time period during which they are entitled to dispute the debt under FDCPA section 809(b).

For these reasons, and pursuant to its authority to interpret FDCPA section 809(a)(4) and (b), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(3)(i) to provide that validation information includes a statement that specifies the end date of the validation period and states that, if the consumer notifies the debt collector in writing before the end of the validation period that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt until the debt collector sends the consumer either the verification of the debt or a copy of a judgment. The Bureau requests comment on proposed § 1006.34(c)(3)(i).

34(c)(3)(ii)

FDCPA section 809(a)(5) requires debt collectors to disclose to consumers their right under FDCPA section 809(b) to request, within 30 days after receipt of the validation information, the name and address of the original creditor, if different than the current creditor. FDCPA section 809(a)(5) does not expressly indicate that a debt collector must disclose to consumers that an original-creditor information request invokes FDCPA section 809(b)'s collections pause, or whether a debt collector must disclose the end date of the validation period.

FDCPA section 809(b)'s collections pause is an integral feature of the consumer's right to request original-creditor information under FDCPA section 809(a)(5). Unless debt collectors disclose the collections pause, consumers may not fully appreciate their right to request original-creditor information under FDCPA section 809(b).

The validation period end date similarly is an integral feature of a consumer's right to request original-creditor information. Unless debt collectors disclose the validation period end date, consumers may be uncertain about the time period during which they are entitled to request original-creditor information under FDCPA section 809(b).

For these reasons, and pursuant to its authority to interpret FDCPA section 809(a)(5) and (b), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(3)(ii) to provide that validation information includes a statement that specifies the end date of the validation period and states that, if the consumer requests in writing before the end of the validation period the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector sends the consumer the name and address of the original creditor, if different from the current creditor. The Bureau requests comment on proposed § 1006.34(c)(3)(ii). In particular, the Bureau notes that the proposed § 1006.34(c)(3)(ii) disclosure language that appears on proposed Model Form B–3 omits the statutory phrase, ''if different from the current creditor.'' The Bureau intentionally omitted this phrase to achieve a plain language disclosure that enhances consumer understanding. The Bureau requests comment on whether omitting this phrase on proposed Model Form B–3 would enhance consumer understanding by simplifying the statutory language, or whether it might lead consumers incorrectly to conclude that a debt collector always would need to cease collection upon request for original-creditor information, even if the original creditor and the current creditor were the same.

34(c)(3)(iii)

FDCPA section 809(a)(3) requires a debt collector to disclose to a consumer that, unless the consumer disputes the validity of the debt within 30 days of receipt of the validation information, the debt collector will assume the debt to be valid. The Bureau is aware that courts in various jurisdictions have reached different conclusions about whether FDCPA section 809(a)(3) requires debt collectors to recognize oral disputes, received within 30 days of a consumer's receipt of the validation information, about the validity of the debt.[483] These differing decisions

[480] *See* 15 U.S.C. 1692g(a)(4) and (5).

[481] FMG Cognitive Report, *supra* note 40, at 30; *see also* FMG Summary Report, *supra* note 42, at 25.

[482] FTC Modernization Report, *supra* note 176, at 26–27.

[483] *Compare Clark* v. *Absolute Collection Serv., Inc.,* 741 F.3d 487, 490 (4th Cir. 2014) (holding that oral disputes trigger certain FDCPA protections, including under FDCPA section 809(a)(3)), *Hooks* v. *Forman, Holt, Eliades & Ravin, LLC,* 717 F.3d 282, 286 (2d Cir. 2013) (same), *and Camacho* v. *Bridgeport Fin. Inc.,* 430 F.3d 1078, 1082 (9th Cir. 2005) (same), *with Graziano* v. *Harrison,* 950 F.2d 107, 112 (3d Cir. 1991) (''[A] dispute, to be effective, must be in writing''), *and Durnell* v. *Stoneleigh*

Continued

principally arise from the fact that, whereas FDCPA section 809(a)(4) and (5) explicitly require a consumer to submit a written dispute to invoke the FDCPA's verification rights, FDCPA section 809(a)(3) specifies no writing requirement. In the absence of an express writing requirement in FDCPA section 809(a)(3), the majority of circuit courts that have considered this issue have determined that a consumer's oral dispute triggers certain FDCPA protections, including, for example, FDCPA section 810's payment application requirement.[484] These decisions have created uncertainty for debt collectors in some jurisdictions when seeking to comply with FDCPA section 809(a)'s disclosure requirements.[485]

Consistent with the position articulated by the majority of circuit courts, and pursuant to its authority to implement and interpret FDCPA section 809(a)(3) as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes to interpret FDCPA 809(a)(3) to allow oral disputes. The Bureau believes that this may be the most persuasive interpretation of Congressional intent, given the lack of the words ''in writing'' in FDCPA 809(a)(3), as compared to the presence of those words throughout FDCPA 809(a)'s other provisions. Accordingly, the Bureau proposes § 1006.34(c)(3)(iii) to provide that validation information includes a statement that specifies the end date of the validation period and states that, unless the consumer contacts the debt collector to dispute the validity of the debt, or any portion of the debt, before the end of the validation period, the debt collector will assume that the debt is valid. Model Form B–3 would inform consumers that they have the option to ''call'' or ''write'' a debt collector to dispute the validity of a debt during the validation period. While Model Form B–3 would alert consumers to an oral dispute option, the form would clarify that only a written dispute would invoke verification rights pursuant to FDCPA sections 809(a)(4) and (5).[486] As discussed in the section-by-section analysis of proposed § 1006.34(d)(2), the use of Model Form B–3 would provide debt collectors with a safe harbor for compliance with FDCPA section 809(a)'s disclosure requirements.[487] The Bureau requests comment on whether debt collectors require additional clarification about how to comply with FDCPA section 809(a)(3).

34(c)(3)(iv)

As discussed in the section-by-section analysis of proposed § 1006.34(c)(3), consumers may not receive sufficient information about their rights and protections in debt collection. While validation information helps consumers determine if a particular debt is theirs and facilitates action in response to a collection attempt, consumers could benefit if validation information included additional information about consumer protections in debt collection. The Bureau makes such information available on its website and intends to develop additional resources to enhance consumer understanding of these protections and the debt collection process in general. The Bureau is developing a reference document that would describe certain legal protections relevant to debt collection. This reference document was initially conceived as a mandatory disclosure that debt collectors would be required to provide to consumers along with the validation notice. Although the Bureau does not propose to require debt collectors to provide the reference document to consumers, if the Bureau finalizes proposed § 1006.34(c)(3)(iv), the Bureau would publish a version of the document as a consumer resource on the Bureau's website before the final rule's effective date.[488]

To enhance consumer understanding of protections available during the debt collection process, and pursuant to its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(3)(iv) to provide that, if a debt collector is collecting a consumer financial product or service debt, as defined in § 1006.2(f), then validation information includes a statement that informs the consumer that additional information regarding consumer rights in debt collection is available on the Bureau's website at *https://www.consumerfinance.gov*.[489] The Bureau proposes this requirement on the basis that this information informs consumers how to exercise their FDCPA rights and protections and therefore is a feature of debt collection. The Bureau requests comment on proposed § 1006.34(c)(3)(iv).

34(c)(3)(v)

As discussed below, proposed § 1006.34(c)(4) would provide that validation information includes information that a consumer can use to take certain actions, which generally include disputing a debt or requesting original-creditor information.[490] As discussed in the section-by-section analysis of proposed § 1006.34(c)(3)(i) and (ii), FDCPA section 809(b) provides that consumers must notify a debt collector ''in writing'' to dispute a debt or request original-creditor information. As discussed in the section-by-section analysis of proposed § 1006.38, the Bureau would interpret FDCPA section 809(b)'s writing requirement as being satisfied when a consumer submits a dispute or request for original-creditor information to the debt collector via a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as email or a website portal. Thus, debt collectors only would be required to give legal effect to consumer disputes or requests for original-creditor information submitted electronically where a debt collector chooses to accept electronic communications from consumers. This would apply regardless of whether the validation notice itself is delivered electronically.

Further, FDCPA section 809(b) prohibits debt collector communications during the validation period that are inconsistent with the disclosure of a consumer's verification rights. If debt collectors refuse to accept consumers' disputes or requests for original-creditor information through a medium of electronic communication after

Recovery Assocs., LLC, (No. 18–2335), 2019 WL 121197, at *3–4 (E.D. Pa. Jan. 7, 2019) (holding that a validation notice that ''mirror[ed] the language'' of the FDCPA section 809 still violated the FDCPA because disputes must be in writing).

[484] *See* 15 U.S.C. 1692i; *Camacho,* 430 F.3d at 1081–82 (holding that oral disputes trigger certain FDCPA protections, including under FDCPA sections 807(8) and 810).

[485] *See, e.g., Caprio* v. *Healthcare Revenue Recovery Grp.,* 709 F.3d 142, 151–52 (3d Cir. 2013) (holding that a collection letter encouraging a consumer to ''please call'' the debt collector violated FDCPA section 809(a)); *Riggs* v. *Prober & Raphael,* 681 F.3d 1097, 1103–04 (9th Cir. 2012) (holding that a validation notice that implied a written dispute requirement—but that did not expressly require a written dispute—did not violate FDCPA section 809(a)(3)); *Homer* v. *Law Offices of Frederic I. Weinberg & Assocs., P.C.,* 292 F. Supp. 3d 629, 633–34 (E.D. Pa. 2017) (holding that a validation notice that used ''hears from you'' language was deceptive because it suggested that disputes could be made orally).

[486] See the section-by-section analysis of proposed § 1006.34(c)(3)(i) and (ii).

[487] See the section-by-section analysis of proposed § 1006.34(d)(2).

[488] For additional detail about information that may appear on the reference document, refer to appendix G of the Small Business Review Panel Outline, *supra* note 56.

[489] To the extent that the Bureau develops a more specific landing page for information about consumer protections during the debt collection process, the Bureau would include the website address for that landing page in a final rule.

[490] Proposed § 1006.34(c)(4) would set forth required consumer response information. Proposed § 1006.34(d)(3)(iii)(B) and (vi)(B) would permit certain other consumer response information related to payment requests and requests for Spanish-language validation notices.

providing an electronic validation notice through that same medium, consumers may become confused about how to exercise their verification rights. While the FDCPA does not directly address electronic debt collection communications, a reasonable consumer could expect to be able to respond to a debt collector through the same medium of electronic communication that the debt collector used to contact the consumer. Because of the potential for confusion, a debt collector's refusal to accept a dispute or request for original-creditor information electronically after providing a validation notice electronically may be inconsistent with the effective disclosure of the consumer's verification rights.

For these reasons, and pursuant to its authority to interpret FDCPA section 809(a) and (b), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(3)(v) to provide that validation information includes a statement explaining how a consumer can take the actions described in § 1006.34(c)(4) electronically, if the debt collector sends the validation notice electronically. Proposed comment 34(c)(3)(v)–1 explains that a debt collector may provide the information described in proposed § 1006.34(c)(3)(v) by including the statements, ''We accept disputes electronically,'' using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(i), and ''We accept original creditor information requests electronically,'' using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(ii). Proposed comment 34(c)(3)(v)–1 also would clarify that, if a debt collector accepts electronic communications from consumers through more than one medium, such as by email and through a website portal, the debt collector is only required to provide information regarding one of these media but may provide information about additional media.

During the SBREFA process, small entity representatives supported the Bureau's proposal to clarify how debt collectors could use newer communication technologies, such as email and text messages, which some consumers may prefer.[491] Consistent with this feedback, the Small Business Review Panel Report recommended that the Bureau consider whether the debt collection rule should promote newer communication technologies, and, if so, establish guidelines for the appropriate use of such technologies.[492] Proposed § 1006.34(c)(3)(v) is responsive to this feedback. The Bureau requests comment on proposed § 1006.34(c)(3)(v) and on comment 34(c)(3)(v)–1.

34(c)(3)(vi)

As discussed elsewhere in this proposed rule—for example, in the section-by-section analysis of proposed § 1006.42—the use of electronic media such as email and text messages for debt collection communications may further the interests of both consumers and debt collectors, but communications sent by such media may require tailored protections for consumers. One such protection, as proposed in § 1006.6(e), would require a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for a text message, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number.

Consistent with proposed § 1006.6(e), and pursuant to the legal authorities discussed in the section-by-section analysis thereof, the Bureau proposes § 1006.34(c)(3)(vi) to provide that, for a validation notice delivered in the body of an email pursuant to § 1006.42(b)(1) or (c)(2)(i), validation information includes the opt-out statement required by § 1006.6(e). Proposed comment 34(c)(3)(vi)–1 explains that, if a validation notice is delivered on a website pursuant to § 1006.42(c)(2)(ii), the validation notice need not contain the opt-out statement because the statement will be required in any email or text message that provides a hyperlink to the website where the notice is placed. Proposed comment 34(c)(3)(vi)–1 further explains that delivery of a validation notice that a debt collector previously provided pursuant to § 1006.42(b)(1) or (c)(2)(i) or (ii) is not rendered ineffective because a consumer opts out of future electronic communications. The Bureau requests comment on proposed § 1006.34(c)(3)(vi) and on comment 34(c)(3)(vi)–1.

34(c)(4) Consumer Response Information

The FTC has noted that some consumers do not receive sufficient information explaining how they may exercise their FDCPA rights.[493] This observation is consistent with at least one academic study, which found that many consumers did not understand how to properly exercise their FDCPA verification rights even after reviewing a typical validation notice.[494]

During the development of this proposal, the Bureau tested validation notices that included information about how consumers could exercise their FDCPA verification rights using a separate section of the notice, which consumers could detach and return to the debt collector. For purposes of this section-by-section analysis, the Bureau refers to this information as consumer response information. The Bureau's usability testing indicated that consumers understood that they could use the consumer response information to dispute a debt, or to communicate that information about the debt in the validation notice was incorrect.[495] The usability testing findings thus indicated that the consumer response information enhanced consumers' comprehension of their dispute rights.[496]

The Bureau's testing suggests that requiring debt collectors to disclose consumer response information, segregated from other validation information, appears to help consumers exercise their FDCPA section 809(b) rights to dispute the validity of a debt and to request original-creditor information. Further, the consumer response information may facilitate a debt collector's ability to process and understand a consumer's response to a validation notice. For example, by requiring the consumer response information section to include statements describing specific reasons for disputes, proposed § 1006.34(c)(4) could reduce the burden of responding to generic or ambiguous disputes. While the proposal would not require consumers to indicate a specific dispute

[491] *See* Small Business Review Panel Report, *supra* note 57, at 16–17; *see also* CFPB Debt Collection Consumer Survey, *supra* note 18, at 37 (finding that email was the most preferred contact method for 11 percent of consumers contacted about a debt in collection).

[492] Small Business Review Panel Report, *supra* note 57, at 38.

[493] *See* FTC Modernization Report, *supra* note 176, at v.

[494] *See* Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices,* 70 SMU L. Rev. 63, 94–98 (2017).

[495] *See* FMG Usability Report, *supra* note 41, at 59–60.

[496] *See id.*

description listed in the consumer response information, consumers may be likely to do so, thereby lessening the number of generic disputes (*e.g.,* a communication that only contains the statement ''I dispute'' with no further detail) sent to debt collectors.[497]

For these reasons, the Bureau proposes requiring a consumer response information section on the validation notice. Specifically, proposed § 1006.34(c)(4) provides that the validation information that must be disclosed under § 1006.34(a)(1) includes certain consumer response information situated next to prompts that the consumer could use to indicate that action or request. The information, which is discussed in the section-by-section analysis of proposed § 1006.34(c)(4)(i) through (iii), would include statements describing certain actions that a consumer could take, including submitting a dispute, identifying the reason for the dispute, providing additional detail about the dispute, and requesting original-creditor information.[498]

Proposed § 1006.34(c)(4) provides that the consumer response information section must be segregated from the validation information described in § 1006.34(c)(1) through (3) and from any optional information included pursuant to § 1006.34(d)(3)(i), (ii), (iv), or (v) and, if the validation information is provided in writing or electronically, located at the bottom of the notice and under the headings, ''How do you want to respond?'' and ''Check all that apply:''. Requiring the consumer response information section to be presented in this manner may help consumers respond to the disclosures required under § 1006.34(a)(1). Specifically, requiring the information to be located at the bottom of a validation notice may enable consumers to use the bottom section of the notice to reply to the debt collector while retaining the required disclosures located in the validation notice's upper section. Proposed comment 34(c)(4)–1 would clarify that, if the validation information is provided in writing or electronically, a prompt described in § 1006.34(c)(4) may be formatted as a checkbox, as in Model Form B–3.

The Bureau requests comment on proposed § 1006.34(c)(4). The Bureau specifically requests comment on whether validation information should include consumer response information, and, if so, on whether any of the proposed items should be excluded or any additional items should be added.

The Bureau proposes § 1006.34(c)(4) pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors and, as described more fully below, its authority to implement and interpret FDCPA section 809. The Bureau also proposes § 1006.34(c)(4) pursuant to its authority under section 1032(a) of the Dodd-Frank Act, on the basis that the information in proposed § 1006.34(c)(4)(i) through (iii) informs consumers how to exercise their rights under FDCPA section 809(b) and therefore is a feature of debt collection. Requiring disclosure of the information may help to ensure that the features of debt collection are fully, accurately, and effectively disclosed to consumers, such that consumers may better understand the costs, benefits and risks associated with debt collection.

34(c)(4)(i) Dispute Prompts

FDCPA section 809(a)(4) requires a debt collector to disclose to consumers their right under FDCPA section 809(b) to dispute the validity of the debt within 30 days after receipt of the validation notice. As discussed in the section-by-section analysis of proposed § 1006.34(c)(3)(i), which would implement and interpret FDCPA section 809(a)(4), some consumers may not adequately understand this FDCPA dispute right or may face challenges when attempting to exercise it. Providing consumers with prepared dispute statements may assist consumers by helping them articulate the nature of their disputes. Enabling consumers to communicate specific information about their disputes also may reduce the number of burdensome, generic disputes received by debt collectors and may allow debt collectors to provide more relevant information in response.

For this reason, and pursuant to its authority to implement and interpret FDCPA section 809(a)(4), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(4)(i) to provide that consumer response information includes statements, situated next to prompts, that the consumer can use to dispute the validity of a debt and to specify a reason for that dispute. Proposed § 1006.34(c)(4)(i), which is designed to work in tandem with proposed § 1006.34(c)(3)(i), would provide that consumer response information includes the following four statements, listed in the following order, using the following phrasing or substantially similar phrasing,[499] each next to a prompt: ''I want to dispute the debt because I think:''; ''This is not my debt''; ''The amount is wrong''; and ''Other: (please describe on reverse or attach additional information).'' The first three proposed dispute categories appear to capture the vast majority of consumer disputes about the validity of a debt.

During the SBREFA process, small entity representatives suggested that including dispute prompts in the validation notice could increase dispute volume and frequency, which could cause debt collectors to incur more costs investigating and responding to disputes. Some small entity representatives particularly were concerned that the consumer response information might increase the number of generic disputes that lack enough detail for debt collectors to provide responsive information to consumers. Several small entity representatives also objected to a potential dispute prompt that would state, ''You are not the right person to pay,'' noting that this statement would not provide debt collectors enough information to respond effectively to the dispute and would require the debt collector to re-contact the consumer, imposing costs on both debt collectors and consumers. The Small Business Review Panel Report recommended that the Bureau consider further its proposed consumer response information, including soliciting more specific disputes.

In response to this feedback, the proposed rule omits the dispute prompt, ''You are not the right person to pay.'' However, the proposed rule retains the consumer response information concept. Proposed § 1006.34(c)(4)(i) may facilitate consumers' ability to exercise their dispute right, which is an important FDCPA protection. In addition, proposed § 1006.34(c)(2), by requiring more information about the debt, may help consumers recognize debts that they owe, reducing the number of disputes arising from lack of consumer recognition and, thereby, limiting overall dispute volume. Further, any information that consumers provide in response to the free-form dispute prompt in proposed § 1006.34(c)(4)(i)(D) could help debt collectors better understand the nature of a consumer's dispute and respond

[497] Usability testing findings suggested that consumers generally understood how to use the consumer response information section to indicate a specific reason for a dispute. *See id.* at 59–61.

[498] As discussed in the section-by-section analysis of proposed § 1006.34(d)(3)(iii)(B) and (vi)(B), a debt collector also could choose to include a payment disclosure and Spanish-language validation notice request disclosure as consumer response information.

[499] To provide debt collectors with greater flexibility, the Bureau does not propose to require a debt collector to use the exact phrasing set forth in proposed § 1006.34(c)(4)(i).

more efficiently than if consumers had provided generic disputes.

The Bureau requests comment on proposed § 1006.34(c)(4)(i), including on whether any dispute prompts should be added, revised, or removed. In addition, the Bureau requests comment on the potential risks, costs, and benefits of the dispute prompts for both consumers and industry, including on whether proposed § 1006.34(c)(4)(i) will impact dispute volumes or affect the proportion of specific disputes that debt collectors receive as compared to generic disputes.

As discussed in the section-by-section analysis of proposed § 1006.38, the Bureau would interpret FDCPA section 809(b) to require a debt collector to honor disputes that a consumer provides via a medium of written electronic communication [500] accepted by the debt collector, such as a dispute portal accessed on or through a hyperlink in an electronic communication. The Bureau declines to propose requirements related to debt collector website communications, including the content or formatting of dispute information accessible via website or hyperlink.[501] The Bureau requests comment on whether the Bureau should propose rules concerning website communications. In particular, the Bureau requests comment about the risks, costs, and benefits to consumers and industry related to prescribing requirements for the content and formatting of debt collector website communications.

34(c)(4)(ii) Original-Creditor Information Prompt

FDCPA section 809(a)(5) requires a debt collector to disclose to consumers their right under FDCPA section 809(b) to request the name and address of the original creditor, if different from the current creditor.[502] As discussed in the section-by-section analysis of proposed § 1006.34(c)(3)(ii), which would implement and interpret FDCPA section 809(a)(5), some consumers may not adequately understand their right to request original-creditor information or how to exercise it. Providing consumers with a prepared statement that they could use to request original-creditor information could help to address this concern.

For this reason, and pursuant to its authority to interpret FDCPA section 809(a)(5), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(4)(ii) to provide that consumer response information includes the statement, ''I want you to send me the name and address of the original creditor,'' using that phrase or a substantially similar phrase, next to a prompt the consumer could use to request original-creditor information. Proposed § 1006.34(c)(4)(ii) is intended to work in tandem with proposed § 1006.34(c)(3)(ii). The Bureau requests comment on proposed § 1006.34(c)(4)(ii).

34(c)(4)(iii) Mailing Addresses

FDCPA section 809(b) assumes that a consumer has the ability to write to a debt collector to exercise the consumer's verification rights. Requiring a debt collector to include mailing addresses for the consumer and the debt collector, which would include the consumer's and the debt collector's names, along with the consumer response information described in proposed § 1006.34(c)(4)(i) and (ii), may facilitate consumers' use of that address information to exercise their debt collection rights. For example, for mailed validation notices, a debt collector may choose to format the addresses to appear in a return envelope's glassine window, which the Bureau understands is industry practice. Alternatively, the mailing address may be useful in the event the consumer loses the upper portion of the validation notice containing the debt collector's contact information. In this scenario, the consumer also could review the mailing address in the consumer response information section to confirm that the consumer was the intended recipient of the validation notice. For these reasons, and pursuant to its authority to implement FDCPA section 809(a), as well as its authority under Dodd-Frank Act section 1032(a), the Bureau proposes § 1006.34(c)(4)(iii) to provide that consumer response information includes mailing addresses for the consumer and the debt collector.

The Bureau requests comment on proposed § 1006.34(c)(4)(iii). The Bureau understands that some debt collectors use letter vendors to mail validation notices and that, in some cases, the letter vendor's mailing address may appear on validation notices in lieu of the debt collector's mailing address. The Bureau requests comment on whether proposed § 1006.34(c)(4)(iii) would be consistent with current practices related to debt collectors' use of letter vendors to mail validation notices.

34(c)(5) Special Rule for Certain Residential Mortgage Debt

FDCPA section 809(a)(1) requires a debt collector to disclose to consumers the amount of the debt. As discussed in the section-by-section analysis of proposed § 1006.34(c)(2)(vii) through (ix), the Bureau interprets FDCPA section 809(a)(1) to require debt collectors to disclose three pieces of itemization-related information: The itemization date; the amount of the debt on the itemization date; and an itemization of the debt reflecting interest, fees, payments, and credits since the itemization date.[503] The Bureau proposes to establish a special rule that would replace these disclosure requirements for debt collectors collecting certain residential mortgage debt.

For certain residential mortgage debt subject to 12 CFR 1026.41, 12 CFR 1026.41(b) generally requires that a periodic statement be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle. The Bureau believes that most residential mortgage debt is subject to this requirement, although exceptions exist.[504] The Bureau understands that a consumer is provided with such a periodic statement every billing cycle, even when a loan is transferred between

[500] For ease of reference, the Bureau uses the phrase ''written electronic communications'' to refer to emails, text messages, and other electronic communications that are readable. The Bureau's use of this phrase has no bearing on the Bureau's interpretation of the terms ''written'' or ''in writing'' under any law or regulation, including the FDCPA or the E–SIGN Act.

[501] While the Bureau does not propose rules specifically addressing debt collector website communications, such communications are subject to existing legal requirements, including those under the FDCPA and the Dodd-Frank Act. For example, debt collectors may be liable for website communications that violate the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive practices, or the overshadowing prohibition under FDCPA section 809(b).

[502] Proposed § 1006.34(c)(2)(iv) also would require that the validation notice include the name of the creditor to whom the debt was owed on the itemization date, if the debt collector is collecting a consumer financial product or service debt, as defined in proposed § 1006.2(f).

[503] Proposed § 1006.34(c)(2)(x) would require debt collectors also to disclose the current amount of the debt.

[504] The periodic statement requirement pursuant to 12 CFR 1026.41(b) does not apply to open-end consumer credit transactions, such as a home equity line of credit. *See* 12 CFR 1026.41(a)(1). Pursuant to 12 CFR 1026.41(e), certain types of transactions are exempt from § 1026.41(b)'s periodic statement requirement, including reverse mortgages, timeshare plans, certain charged-off mortgage loans, mortgage loans with certain consumers in bankruptcy, and fixed-rate mortgage loans where a servicer provides the consumer with a coupon book for payment. Further, small servicers as defined by 12 CFR 1026.41(e)(4)(ii) are entirely exempt from the periodic statement requirement. Where the § 1026.41(b) periodic statement was not provided, a debt collector collecting debts related thereto would not be able to satisfy proposed § 1006.34(c)(2)(vii) through (ix) by providing a consumer, at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under § 1026.41(b).

servicers. Pursuant to Regulation Z, 12 CFR 1026.41(d)(3), such a periodic statement must include a past payment breakdown, which shows the total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees, and charges, and the amount, if any, sent to any suspense or unapplied funds account.

The Bureau believes that these periodic statement disclosures may be functionally equivalent to, and as useful for the consumer as, the information described in proposed § 1006.34(c)(2)(vii) through (ix). For example, 12 CFR 1026.41(d)(3) requires that the past payment breakdown reflect payments, interest, and other charges since the last periodic statement. This requirement is consistent with the proposed rule: Pursuant to proposed § 1006.34(b)(3)'s itemization date definition, a debt collector may use the date of the last periodic statement as the reference date for the itemization-related information required by proposed § 1006.34(c)(2)(vii) through (ix). Further, the periodic statement required by 12 CFR 1026.41(b) is tailored to disclose mortgage information effectively. For example, the periodic statement under 12 CFR 1026.41(d) specifically addresses disclosure of escrow and suspense account information. Proposed § 1006.34(c)(2)(vii) through (ix), which applies to debts more generally, is silent with respect to these mortgage-specific concepts.

For these reasons, proposed § 1006.34(c)(5) would establish that, for debts subject to Regulation Z, 12 CFR 1026.41, a debt collector need not provide the validation information described in § 1006.34(c)(2)(vii) through (ix) if the debt collector provides the consumer, at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under 12 CFR 1026.41(b), and refers to that periodic statement in the validation notice. Proposed comment 34(c)(5)–1 provides examples clarifying how debt collectors may comply with § 1006.34(c)(5).

The Bureau proposes § 1006.34(c)(5) to implement and interpret the FDCPA section 809(a)(1) requirement that the validation notice include the amount of the debt, and pursuant to its FDCPA section 814(d) authority to prescribe rules with respect to the collection of debts by debt collectors. The Bureau also proposes this requirement under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products and services are disclosed fully, accurately, and effectively. The Bureau proposes this requirement on the basis that the information otherwise required to be disclosed under § 1006.34(c)(2)(vii) through (ix) is a feature of debt collection and the alternative information that proposed § 1006.34(c)(5) would permit is equally effective and accurate for the collection of debts subject to 12 CFR 1026.41. For the reasons described above, the Bureau proposes § 1006.34(c)(5) to ensure that the debt, which is a feature of debt collection, is fully, accurately, and effectively disclosed in a manner that permits the consumer to understand the costs, benefits, and risks associated with debt collection.

The Bureau requests comment on proposed § 1006.34(c)(5) and on comment 34(c)(5)–1. In particular, the Bureau requests comment on the application of proposed § 1006.34(c)(5) to mortgage debt for which consumers were provided coupon books. For instance, the Bureau believes that for mortgage debt for which consumers were provided coupon books, debt collectors could comply with proposed § 1006.34(c)(5) because servicers generally have a practice of providing periodic statements to delinquent consumers, even if coupon books were previously provided. The Bureau also requests comment on the extent to which creditors, assignees, and servicers for transaction types that are exempt from 12 CFR 1026.41(b)'s periodic statement requirement pursuant to § 1026.41(e) nevertheless provide periodic statements voluntarily and, if so, whether the Bureau should clarify how proposed § 1006.34(c)(5) would apply in those circumstances. The Bureau also requests comment on the application of proposed § 1006.34(c)(5) to servicers exempt from 12 CFR 1026.41(b)'s periodic statement requirement pursuant to § 1026.41(e), such as small servicers or servicers servicing mortgage loans that have been charged off, and servicers who provide modified periodic statements pursuant to 12 CFR 1026.41(f) where a consumer on the mortgage loan is a debtor in bankruptcy. Finally, the Bureau also requests comment on whether there are other debt types, such as student loan debt, for which the information described in proposed § 1006.34(c)(vii) through (ix) may duplicate existing disclosure requirements.

34(d) Form of Validation Information

34(d)(1) In General

34(d)(1)(i)

FDCPA section 809(a)'s required disclosures will be ineffective unless a debt collector discloses them in a manner that is readily understandable to consumers. For this reason, the Bureau proposes § 1006.34(d)(1) to require that the validation information described in § 1006.34(c) be conveyed in a clear and conspicuous manner. As discussed in the section-by-section analysis of § 1006.34(b)(1), the Bureau proposed to define the term clear and conspicuous consistent with the standards used in other consumer financial services laws and their implementing regulations. The clear and conspicuous standard would apply to written, electronic, and oral disclosures.

The Bureau proposes § 1006.34(d)(1)(i) to implement and interpret FDCPA section 809(a), and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. The Bureau also proposes § 1006.34(d)(1)(i) pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products and services are disclosed fully, accurately, and effectively. The Bureau proposes this requirement on the basis that validation information is a feature of debt collection and this information must be readily understandable to be effectively and accurately disclosed. The Bureau requests comment on proposed § 1006.34(d)(1)(i).

34(d)(1)(ii)

As discussed in the section-by-section analysis of proposed § 1006.34(d)(2), the Bureau proposes Model Form B–3 in appendix B as a model validation notice form that debt collectors could use to comply with the disclosure requirements of proposed § 1006.34(a)(1) and (d)(1). Model Form B–3 was developed over multiple rounds of consumer testing and through additional feedback and consideration, as described in part III.B above. The Bureau believes that this form effectively discloses the information described in proposed § 1006.34(c). For the same reasons and pursuant to the same authority discussed in the section-by-section analysis of proposed § 1006.34(d)(1)(i), proposed § 1006.34(d)(1)(ii) would require that, if provided in a validation notice, the content, format, and placement of the information described in proposed § 1006.34(c) and the optional

disclosures permitted by proposed § 1006.34(d)(3) must be substantially similar to proposed Model Form B–3 in appendix B.

Proposed comment 34(d)(1)(ii)–1 explains that a debt collector may make certain changes to the content, format, and placement of the validation information described in § 1006.34(c) as long as the resulting disclosures are substantially similar to Model Form B–3 in appendix B of the regulation. Proposed comment 34(d)(1)(ii)–1 also provides an example of a change that debt collectors may make to the validation notice if the consumer is deceased. As described in the section-by-section analyses of §§ 1006.2(e) and 1006.6(a)(4), the proposal includes interpretations of the term consumer designed to clarify communications between debt collectors and individuals attempting to resolve the debts of a deceased consumer, including provision of the validation notice to such individuals. Although the validation notice will contain the name of the deceased consumer, some persons who are authorized to act on behalf of the deceased consumer's estate may be misled by the use of second person pronouns such as ''you'' in the validation notice. For example, the model validation notice states that ''you owe'' the debt collector.

While nothing in the proposed rule would prohibit a debt collector from including a cover letter to explain the nature of the validation notice, proposed comment 34(d)(1)(ii)–1 also would clarify that a debt collector may modify inapplicable language in the validation notice that could suggest that the recipient of the notice is liable for the debt. For example, if a debt collector sends a validation notice to a person who is authorized to act on behalf of the deceased consumer's estate, and if that person is not liable for the debt, the debt collector may use the deceased consumer's name instead of ''you.'' In other contexts, such as mortgage servicing, the Bureau has allowed servicers to include an explanatory notice and acknowledgement form, add an affirmative disclosure, or adjust language in required notices to reduce the risk of confusion to successors in interest.[505] The Bureau proposes a similar approach in § 1006.34 and comment 34(d)(1)(ii)–1. The Bureau requests comment on proposed comment 34(d)(1)(ii)–1, on the risk of confusion or deception caused by the second-person framing of the model validation notice in the deceased-consumer context, and on options for reducing any possible confusion or deception.

34(d)(2) Safe Harbor

A model validation notice form that provides a safe harbor may benefit both consumers and debt collectors. A model validation notice form may effectively disclose validation information required by § 1006.34(a)(1) in a manner that permits consumers to understand the costs, benefits, and risks associated with debt collection. Further, a model form may afford debt collectors protection from liability that could arise if they developed and used their own forms. During the SBREFA process, small entity representatives asserted that a model form that provided protection from liability would promote efficiency and predictability for debt collectors by reducing legal risk.[506] Because of these potential benefits, the Bureau has developed a model validation notice—Model Form B–3 in appendix B.

Model Form B–3 was evaluated over multiple rounds of consumer testing, as described in part III.B above, as well as through additional feedback and consideration.[507] Based on this testing, the Bureau believes that Model Form B–3 effectively discloses the validation information required by § 1006.34(a)(1). Because of Model Form B–3's effectiveness, and pursuant to its authority under section 1032(b) of the Dodd-Frank Act, the Bureau proposes § 1006.34(d)(2) to permit a debt collector to comply with § 1006.34(a)(1)(i) and (d)(1) by using Model Form B–3 in appendix B.

Proposed comment 34(d)(2)–1 explains that, although the use of Model Form B–3 in appendix B is not required, a debt collector who uses the model form, including a debt collector who delivers the model form electronically, will be in compliance with the disclosure requirements of § 1006.34(a)(1)(i) and (d)(1) and the requirements of FDCPA section 809(a). Proposed comment 34(d)(2)–1 also explains that a debt collector who includes on Model Form B–3 the optional disclosures described in proposed § 1006.34(d)(3) continues to be in compliance as long as those disclosures are made consistent with the instructions in § 1006.34(d)(3). Further, proposed comment 34(d)(2)–1 explains that a debt collector may embed hyperlinks in Model Form B–3 if delivering the form electronically and continue to be in compliance as long as the hyperlinks are included consistent with § 1006.34(d)(4)(ii).

The Bureau requests comment on proposed § 1006.34(d)(2) and on proposed comment 34(d)(2)–1. In particular, the Bureau requests comment on whether the Bureau should provide additional clarification about how to deliver Model Form B–3 electronically in a manner that affords protection from liability pursuant to proposed § 1006.34(d)(2). For example, the Bureau requests comment on whether to prescribe or define additional formatting requirements (*e.g.,* type size) or delivery standards for validation notices delivered electronically. The Bureau also requests comment on the risks, costs, and benefits to consumers and industry of extending the protection from liability pursuant to proposed § 1006.34(d)(2) to validation notices delivered electronically.

34(d)(3) Optional Disclosures

Proposed § 1006.34(d)(3) provides that a debt collector may include the optional information described in proposed § 1006.34(d)(3)(i) through (vi) if providing the validation information required by § 1006.34(a)(1). These optional disclosures may assist debt collectors and consumers by providing additional information about the debt and consumers' rights with respect to debt collection in a manner that does not violate FDCPA section 809(b)'s overshadowing prohibition, a prohibition implemented by § 1006.38(b). Under the proposal, providing the disclosures in proposed § 1006.34(d)(3) would not be regarded as overshadowing or inconsistent with the disclosure about the consumer's right to dispute the debt or request the name and address of the original creditor. The Bureau proposes § 1006.34(d)(3) to implement and interpret FDCPA section 809(a) and (b) and pursuant to its FDCPA section 814(d) authority to prescribe rules with respect to the collection of debts by debt collectors and pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products

[505] 81 FR 72160, 72182 (Oct. 19, 2016).

[506] Small Business Review Panel Report, *supra* note 57, at 22; *see also Johnson* v. *Revenue Mgmt. Corp.,* 169 F.3d 1057, 1059–60 (7th Cir. 1999) (holding that where a validation notice included demands for ''prompt payment'' and that the consumer call the debt collector ''immediately,'' such statements may confuse a consumer or overshadow their verification rights); *Adams* v. *Law Offices of Stuckert & Yates,* 926 F.Supp. 521, 527 (E.D. Pa. 1996) (holding that a validation notice threatening a lawsuit violated the FDCPA); *Vaughn* v. *CSC Credit Servs., Inc.* (No. 93–4151), 1995 WL 51402, at *3 (N.D. Ill. Feb. 3, 1995) (holding that a statement on a validation notice about a debt's potential negative impact on consumer's credit score violated FDCPA section 809(b) because it overshadowed the verification rights disclosures).

[507] *See generally* FMG Cognitive Report, *supra* note 40; FMG Usability Report, *supra* note 41; FMG Summary Report, *supra* note 42.

and services are disclosed fully, accurately, and effectively.

34(d)(3)(i) Telephone Contact Information

Telephone communications may benefit both debt collectors and consumers by providing a low-cost and convenient communication method. Debt collectors routinely contact consumers by telephone and currently include their telephone numbers in validation notices. Also, some consumers may prefer to engage with debt collectors by telephone rather than by other communication methods.[508] For these reasons, proposed § 1006.34(d)(3)(i) would permit a debt collector to include the debt collector's telephone contact information, including telephone number and the times that the debt collector accepts consumer telephone calls, along with the validation information. The Bureau requests comment on proposed § 1006.34(d)(3)(i).

34(d)(3)(ii) Reference Code

Many debt collectors currently include reference codes on validation notices for administrative purposes. Proposed § 1006.34(d)(3)(ii) would accommodate this practice by permitting a debt collector to include, along with the validation information, a number or code that the debt collector uses to identify the debt or the consumer. The Bureau requests comment on proposed § 1006.34(d)(3)(ii).

34(d)(3)(iii) Payment Disclosures

Payment disclosures that provide a method to easily send payment to a debt collector may benefit both consumers and debt collectors. For consumers who recognize and choose to repay all or part of a debt, payment disclosures may make the transaction more efficient and convenient. For consumers who determine that they owe a debt but may not be ready to repay all of it at that time, payment disclosures may facilitate a discussion that can lead to repayment, settlement, or a payment plan.[509] Consumer testing suggests that consumers believe that a payment option is an important disclosure that should appear in the validation notice.[510] The Bureau also received feedback from debt collectors requesting the ability to request payment from consumers when providing validation information. For example, during the SBREFA process, small entity representatives requested the ability to include payment options in the consumer response information that § 1006.34(c)(4) would require.[511]

Consumer advocates recommended that the Bureau prohibit debt collectors from including payment disclosures along with validation information. Consumer advocates expressed concerns that a consumer who desires to dispute a debt might misconstrue the disclosure to require the consumer to submit a payment in order to exercise the FDCPA dispute right. The Bureau's proposal does not treat these concerns as persuasive. While some formulations of a payment disclosure could create a false sense of urgency or exaggerate the consequences of non-payment,[512] the Bureau believes that payment disclosures can be designed to articulate payment requests in a neutral, non-threatening manner. Moreover, the Bureau's consumer testing indicates that consumers who encounter a payment disclosure on a validation notice understand that a payment is not required to dispute a debt.[513]

For these reasons, the Bureau proposes to allow debt collectors to include certain payment disclosures along with the validation information. Proposed § 1006.34(d)(3)(iii) would permit a debt collector to include certain payment disclosures in the validation notice. Proposed § 1006.34(d)(3)(iii) would require that these optional payment disclosures be no more prominent than any of the validation information described in proposed § 1006.34(c). Proposed § 1006.34(d)(3)(iii)(A) would allow the debt collector to include in the validation notice the statement ''Contact us about your payment options,'' using that phrase or a substantially similar phrase. Proposed § 1006.34(d)(3)(iii)(B) would allow the debt collector to include in the consumer response information section that would be required by proposed § 1006.34(c)(4) the statement, ''I enclosed this amount,'' using that phrase or a substantially similar phrase, payment instructions after that statement, and a prompt. The Bureau requests comment on proposed § 1006.34(d)(3)(iii), including on whether the payment disclosures should be permitted and, if so, whether the payment disclosures should be modified.

34(d)(3)(iv) Disclosures Required by Applicable Law

Some States require specific disclosures to appear on the validation notice. The Small Business Review Panel Report recommended that the Bureau consider how to reconcile the Bureau's model validation notice and such required State law disclosures.[514] The Bureau also understands that some courts have prescribed additional validation notice disclosure requirements, or have fashioned optional disclosures that offer a safe harbor to debt collectors providing information required by the FDCPA. For example, several courts have crafted language that debt collectors may use to comply with FDCPA section 809(a)(1) by disclosing that the amount of a debt may vary because of accruing interest and fees.[515] In response to these judicial opinions, industry commenters have requested that the Bureau address how debt collectors may disclose that the amount of a debt may vary because of accruing interest and fees.

To enable debt collectors to comply both with § 1006.34(a)(1) and with other applicable disclosure requirements, the Bureau proposes § 1006.34(d)(3)(iv) to permit a debt collector to include, on the front of the validation notice, a statement that other disclosures required by applicable law appear on the reverse of the form and, on the reverse of the validation notice, any such legally required disclosures. Proposed comment 34(d)(3)(iv)–1 provides examples of disclosure requirements that proposed § 1006.34(d)(3)(iv) would cover, including disclosures required by State statutes or regulations and disclosures required by judicial opinions or orders.

The Bureau requests comment on proposed § 1006.34(d)(3)(iv) and on comment 34(d)(3)(iv)–1. The Bureau requests comment on conflicts that might arise between the Bureau's model validation notice and other disclosures required by applicable law. In particular, the Bureau requests comment on whether proposed § 1006.34(d)(3)(iv) would allow debt collectors to comply with applicable law, including on

[508] A Bureau survey found that 30 percent of consumers who had been contacted about a debt in the prior year would most prefer to be contacted about a debt in collection at a non-work telephone number, as compared to a work telephone number, postal mail, email, or in-person visits. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 36–37.

[509] FMG Focus Group Report, *supra* note 38, at 9.

[510] FMG Cognitive Report, *supra* note 40, at 17–19.

[511] Small Business Review Panel Report, *supra* note 57, at 22–23.

[512] FMG Focus Group Report, *supra* note 38, at 11–12.

[513] FMG Usability Report, *supra* note 41, at 59–61.

[514] Small Business Review Panel Report, *supra* note 57, at 34.

[515] *See, e.g., Avila* v. *Riexinger & Associates, LLC,* 817 F.3d 72, 77 (2d Cir. 2016); *Miller* v. *McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, LLC,* 214 F.3d 872, 876 (7th Cir. 2000).

whether any disclosures required by applicable law must be included on the front of the validation notice. The Bureau also requests comment on whether proposed § 1006.34(d)(3)(iv) should cover a debt collector who includes on the reverse of the model form disclosures that are permitted, but not required, by applicable law.

34(d)(3)(v) Information About Electronic Communications

Despite the advent of new technologies, the bulk of debt collection communication continues to occur by telephone and mail. Promoting newer technologies may be beneficial both to consumers and debt collectors. During the SBREFA process, small entity representatives supported the Bureau's proposal to clarify how debt collectors could use newer communication technologies, such as email and text messages, and some consumers may prefer electronic communications to traditional communication methods.[516] Consistent with this feedback, the Small Business Review Panel Report recommended that the Bureau consider whether the debt collection rule should promote newer communication technologies, and, if so, establish guidelines for their appropriate use.[517]

For these reasons, proposed § 1006.34(d)(3)(v) would permit certain information about electronic communications to appear along with the validation information. First, proposed § 1006.34(d)(3)(v)(A) would permit debt collectors to provide the debt collector's website and email address. Second, as discussed above, proposed § 1006.34(c)(3)(v) provides that, if a debt collector sends a validation notice electronically, the debt collector must include a statement explaining how a consumer can take the actions described in proposed § 1006.34(c)(4) electronically. Proposed § 1006.34(d)(3)(v)(B) would permit a debt collector to include the statement described in proposed § 1006.34(c)(3)(v) for validation notices not provided electronically. The Bureau requests comment on proposed § 1006.34(d)(3)(v).

34(d)(3)(vi) Spanish-Language Translation Disclosures

Validation information includes important information about the debt and the consumer's rights with respect to debt collection. Consumers with limited English proficiency may benefit from translations of the validation notice in some circumstances, and Spanish speakers represent the second-largest language group in the United States after English speakers.[518] Spanish-speaking consumers with limited English proficiency may benefit from a Spanish-language disclosure informing them of their ability to request a Spanish-language translation, if a debt collector chooses to make such a translation available. Further, debt collectors may wish to provide validation information in Spanish, as doing so may facilitate their communications with consumers. For these reasons, proposed § 1006.34(d)(3)(vi) would allow debt collectors to include along with the validation information optional Spanish-language disclosures that consumers may use to request a Spanish-language validation notice.

34(d)(3)(vi)(A)

Proposed § 1006.34(d)(3)(vi)(A) would permit a debt collector to provide a statement in Spanish informing a consumer that the consumer can request a Spanish-language validation notice. Specifically, proposed § 1006.34(d)(3)(vi)(A) would allow the statement, ''Póngase en contacto con nosotros para solicitar una copia de este formulario en español,'' using that phrase or a substantially similar phrase in Spanish. In English, this phrase means, ''You may contact us to request a copy of this form in Spanish.'' If providing this optional disclosure, a debt collector may include supplemental information in Spanish that specifies how a consumer may request a Spanish-language validation notice. Proposed comment 34(d)(3)(vi)(A)–1 explains that, for example, a debt collector may provide a statement in Spanish that a consumer can request a Spanish-language validation notice by telephone or email.

The Bureau requests comment on proposed § 1006.34(d)(3)(vi)(A) and on comment 34(d)(3)(vi)(A)–1. The Bureau specifically requests comment on: (1) Debt collectors' current collections activities conducted in Spanish, as well as other non-English languages, including whether debt collectors provide validation notices in non-English languages; (2) any benefits, costs, or risks posed for consumers and industry by the disclosure described in proposed § 1006.34(d)(3)(vi)(A); (3) examples of supplemental Spanish-language instructions for requesting a translated validation notice that debt collectors may wish to provide pursuant to proposed § 1006.34(d)(3)(vi)(A); and (4) the benefits or risks this supplemental language disclosure may present, including whether such supplementary information would make the proposed § 1006.34(d)(3)(vi)(A) disclosure less effective.

34(d)(3)(vi)(B)

Proposed § 1006.34(d)(3)(vi)(B) would permit debt collectors to provide a statement in Spanish in the consumer response information section that a consumer can use to request a Spanish-language validation notice. Proposed § 1006.34(d)(3)(vi)(B) would permit the consumer response information section required by § 1006.34(c)(4) to include the statement, ''Quiero esta forma en español,'' using that phrase or a substantially similar phrase in Spanish. In English, this phrase means ''I want this form in Spanish.'' Proposed § 1006.34(d)(3)(vi)(B) would require this statement to be next to a prompt, which the consumer could use to request a Spanish-language validation notice. The Bureau requests comment on proposed § 1006.34(d)(3)(vi)(B).

34(d)(4) Validation Notices Delivered Electronically

As discussed in the section-by-section analysis of proposed § 1006.42, promoting electronic communications may benefit consumers and debt collectors. Allowing debt collectors to make certain formatting modifications to validation notices delivered electronically may help consumers exercise their verification rights under FDCPA section 809. Certain formatting modifications also may facilitate a debt collector's ability to process and understand a consumer's response to a validation notice delivered electronically. Accordingly, the Bureau proposes § 1006.34(d)(4) to permit a debt collector to, at its option, format a validation notice delivered electronically in the manner described in proposed § 1006.34(d)(4)(i) and (ii).[519]

The Bureau proposes § 1006.34(d)(4) to implement and interpret FDCPA section 809(a) by establishing formatting requirements that facilitate the consumer's right to dispute a debt and

[516] Small Business Review Panel Report, *supra* note 57, at 16–17; CFPB Debt Collection Consumer Survey, *supra* note 18, at 37 (finding that email was the most preferred contact method for 11 percent of consumers contacted about a debt in collection).

[517] Small Business Review Panel Report, *supra* note 57, at 38.

[518] As of 2016, 40 million residents in the United States aged five and older spoke Spanish at home. *See* U.S. Census Bureau, *Profile America for Facts for Features CB17–FF.17: Hispanic Heritage Month 2017,* at 4 (Oct. 17, 2017), *https://www.census.gov/newsroom/facts-for-features/2017/hispanic-heritage.html.*

[519] As described in proposed § 1006.42(b)(4), the Bureau proposes additional formatting requirements applicable to validation notices delivered electronically.

request original-creditor information, and pursuant to its FDCPA section 814(d) authority to prescribe rules with respect to the collection of debts by debt collectors. The Bureau also proposes these requirements under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products and services are disclosed fully, accurately, and effectively. The Bureau requests comment on proposed § 1006.34(d)(4).

34(d)(4)(i) Prompts

Proposed § 1006.34(d)(4)(i) would permit a debt collector delivering a validation notice electronically pursuant to § 1006.42 to display any prompt required by § 1006.34(c)(4)(i) or (ii) or (d)(3)(iii)(B) or (vi)(B) as a fillable field. Allowing a debt collector to design a validation notice delivered electronically so that a consumer can take the actions described in proposed § 1006.34(c)(4) by clicking a prompt would benefit consumers and industry. The Bureau believes that this design modification would help consumers exercise their FDCPA verification rights. Further, the Bureau believes this design modification would improve consumer engagement and facilitate a debt collector's ability to process and understand a consumer's response to the validation notice. The Bureau requests comment on proposed § 1006.34(d)(4)(i).

34(d)(4)(ii) Hyperlinks

Proposed § 1006.34(d)(4)(ii) would permit a debt collector delivering a validation notice electronically to embed hyperlinks into the validation notice that, when clicked, connect consumers to the debt collector's website or permit consumers to take the actions described in proposed § 1006.34(c)(4). This formatting modification may help consumers exercise their FDCPA verification rights when they are already engaging with the validation notice in an online setting. This modification also may improve consumer engagement and facilitate a debt collector's ability to process and understand a consumer's response to the validation notice. The Bureau requests comment on proposed § 1006.34(d)(4)(ii).

34(e) Translations Into Other Languages

Consumers with limited English proficiency may benefit from translated disclosures, and some debt collectors may want to respond to the needs of consumers with limited English proficiency using translated disclosures, if doing so is consistent with the debt collector's individual debt collection practices and preferences. At the same time, some consumers who receive translated disclosures may also desire to receive English-language disclosures, either because they are fluent in English, or because they wish to share the disclosures with an English-speaking spouse or assistance provider. English-language disclosures may also allow consumers to confirm the accuracy of the translation.

For these reasons, the Bureau proposes § 1006.34(e) to provide that a debt collector may send a consumer the validation notice completely and accurately translated into any language, if the debt collector also sends an English-language validation notice in the same communication that satisfies proposed § 1006.34(a)(1). If a debt collector already has provided a consumer an English-language validation notice that satisfies proposed § 1006.34(a)(1) and subsequently provides the consumer a validation notice translated into any other language, the debt collector need not provide an additional copy of the English-language notice. Proposed comment 34(e)–1 would clarify that the language of a validation notice obtained from the Bureau's website is considered a complete and accurate translation, although debt collectors are permitted to use other validation notice translations so long as they are accurate and complete.

Consumer advocacy groups have commented that debt collectors should be required to provide validation notices translated into other languages, in particular Spanish, at a consumer's request. For example, some consumer advocacy groups suggested that debt collectors should be required to provide a Spanish-language translation on the reverse of every English-language validation notice.[520] The Bureau declines to propose a mandatory requirement that debt collectors provide translated validation notices to consumers. Requiring debt collectors to provide a translation on a separate page with each validation notice could result in significant cost on a cumulative, industry-wide basis, especially for smaller debt collectors and for languages whose use is not prevalent in the United States. Proposed § 1006.34(e) may strike an appropriate balance by allowing a debt collector to provide translated validation notices if they are complete and accurate and doing so is consistent with the debt collector's individual debt collection practices and preferences in a manner that does not impose undue burden.

The Bureau requests comment on proposed § 1006.34(e) and on comment 34(e)–1. The Bureau also requests comment on whether debt collectors should be required to provide a validation notice translated into a non-English language at a consumer's request.

The Bureau proposes § 1006.34(e) pursuant to its authority under section 1032(a) of the Dodd-Frank Act to prescribe rules to ensure that the features of consumer financial products and services are disclosed fully, accurately, and effectively. The Bureau proposes § 1006.34(e) to ensure that the features of debt collection are fully, accurately, and effectively disclosed.

Section 1006.38 Disputes and Requests for Original-Creditor Information

FDCPA section 809(b) requires debt collectors both to refrain from taking certain actions during the 30 days after the consumer receives the validation information or notice described in FDCPA section 809(a) (*i.e.,* during the validation period) and to take certain actions if a consumer either disputes the debt in writing, or requests the name and address of the original creditor in writing, during the validation period.[521] FDCPA section 809(c) states that a consumer's failure to dispute a debt under FDCPA section 809(b) may not be construed by any court as an admission of liability.[522] Proposed § 1006.38 would implement and interpret FDCPA section 809(b) and (c) as discussed below. Except as otherwise noted, the Bureau proposes § 1006.38 pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

Proposed comment 38–1 would clarify the applicability of § 1006.38 in the decedent debt context. As described in the section-by-section analysis of § 1006.2(e), the Bureau proposes to interpret the term consumer in FDCPA section 803(3) to include deceased consumers.[523] This interpretation would apply to FDCPA section 809(b), as implemented by § 1006.38, so that a deceased consumer (*i.e.,* that consumer's estate) would have the same rights under FDCPA section 809(b) as

[520] The Bureau raised such an alternative approach as a proposal under consideration in the Small Business Review Panel Outline. *See* Small Business Review Panel Outline, *supra* note 56, at appendix F.

[521] 15 U.S.C. 1692g(b).

[522] 15 U.S.C. 1692g(c).

[523] The Bureau proposes to define the term consumer to include ''any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt.'' See the section-by-section analysis of proposed § 1006.2(e).

any living consumer. Accordingly, proposed comment 38–1 would clarify that, if the debt collector knows or should know that the consumer is deceased, and if the debt collector has not previously sent the deceased consumer a written validation notice, then a person who is authorized to act on behalf of the deceased consumer's estate [524] operates as the consumer for purposes of § 1006.38. Proposed comment 38–1 provides that, if such a person submits either a written request for original-creditor information or a written dispute to the debt collector during the validation period, then § 1006.38(c) or (d)(2)(i), respectively, would require the debt collector to respond to that request or dispute. In addition, just as with living consumers, the proposal would require a debt collector attempting to collect a debt from a deceased consumer's estate to cease collection of the debt until, where appropriate, the debt collector has mailed the name and address of the original creditor or provided verification of the debt.

Proposed comment 38–2 also applies generally to proposed § 1006.38. Proposed comment 38–2 notes that proposed § 1006.38 contains requirements related to a dispute or request for original-creditor information timely submitted in writing by the consumer. Proposed comment 38–2 lists three examples of forms of communication that the consumer can use for these purposes. The second example is a medium of electronic communication; the Bureau proposes this example in light of section 101 of the E-SIGN Act.[525]

The E-SIGN Act could affect whether a consumer satisfies the ''in writing'' requirement of FDCPA section 809(b) by submitting a dispute or request for original-creditor information electronically. Section 101(a)(1) of the E-SIGN Act generally provides that a record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form.[526] However, section 101(b)(2) of the E-SIGN Act does not require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.[527] Section 104(b)(1)(A) of the E-SIGN Act permits a Federal agency with rulemaking authority under a statute to interpret by regulation the application of E-SIGN Act section 101 to that statute.[528]

The Bureau proposes to interpret the applicability of the E-SIGN Act as it relates to FDCPA section 809(b)'s writing requirement for consumer disputes or requests for original-creditor information. Specifically, the Bureau would interpret FDCPA section 809(b)'s writing requirement as being satisfied when a consumer submits a dispute or request for original-creditor information using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as email or a website portal.[529] Thus, debt collectors would be required to give legal effect to consumer disputes or requests for original-creditor information submitted electronically only if a debt collector chooses to accept electronic communications from consumers. The Bureau proposes to codify this interpretation of the E-SIGN Act in comment 38–3. The Bureau requests comment on proposed comments 38–1 through 3.

38(a) Definitions

38(a)(1) Duplicative Dispute

The Bureau proposes to define the term duplicative dispute in § 1006.38(a)(1). The Bureau proposes § 1006.38(a)(1) as an interpretation of FDCPA section 809(b) and to facilitate compliance with proposed § 1006.38(d)(2)(ii), which would establish an alternative to proposed § 1006.38(d)(2)(i) [530] applicable if a debt collector reasonably has determined that a dispute is a duplicative dispute. Proposed § 1006.38(a)(1) would define the term duplicative dispute to mean a dispute submitted by the consumer in writing within the validation period that satisfies two criteria. The first criterion is that the dispute is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied the requirements of § 1006.38(d)(2)(i). The second criterion is that the dispute does not include new and material supporting information.

Proposed comment 38(a)(1)–1 would clarify that, for purposes of § 1006.38(a)(1), a later dispute can be substantially the same as an earlier dispute even if the later dispute does not repeat verbatim the language of the earlier dispute. Proposed comment 38(a)(1)–2 would clarify that, for purposes of § 1006.38(a)(1), information is new if the consumer did not provide the information when submitting an earlier dispute, and information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute. Proposed comment 38(a)(1)–2 also provides an example of new and material information.

The Bureau requests comment on proposed § 1006.38(a)(1) and its related commentary. In particular, the Bureau requests comment on whether to specify criteria for determining whether one dispute is substantially similar to another dispute, and, if so, what those criteria should be. In addition, the Bureau requests comment on the estimated percentage of current repeat disputes that would qualify as duplicative disputes under the definition in proposed § 1006.38(a)(1), including whether and how that figure is likely to vary by debt type.

38(a)(2) Validation Period

To facilitate compliance in responding to disputes or requests for original-creditor information, proposed § 1006.38(a)(2) provides that the term validation period as used in § 1006.38 has the same meaning given to it in § 1006.34(b)(5).

38(b) Overshadowing of Rights To Dispute or Request Original-Creditor Information

FDCPA section 809(b) provides that, for 30 days after the consumer receives the validation information or notice described in FDCPA section 809(a), a debt collector must not engage in collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's right to dispute the debt or request information about the original creditor.[531] Proposed § 1006.38(b)

[524] See the section-by-section analysis of proposed § 1006.6(a)(4) and comment 6(a)(4)–1.

[525] 15 U.S.C. 7001(a).

[526] 15 U.S.C. 7001(a)(1).

[527] 15 U.S.C. 7001(b)(2).

[528] 15 U.S.C. 7004(b)(1)(A).

[529] This interpretation is responsive to consumer advocates' feedback recommending that, if a debt collector makes an electronic means of communication available to consumers, electronic communications received from consumers through that channel should satisfy FDCPA section 809(b).

[530] Proposed § 1006.38(d)(2)(i) would implement the requirements in FDCPA section 809(b) regarding disputes and verification. See the section-by-section analysis of proposed § 1006.38(d)(2)(i).

[531] 15 U.S.C. 1692g(b). This language was added to the FDCPA by the Financial Services Regulatory Relief Act of 2006, Public Law 109–351, section 802(c), 120 Stat. 2006 (2006), after an FTC advisory opinion on the same subject. *See* Fed. Trade Comm'n, Advisory Opinion to American Collector's Ass'n (Mar. 31, 2000) (opining that the 30-day period set forth in FDCPA section 809(a) ''is a *dispute* period within which the consumer may

Continued

would implement this prohibition and generally restates the statute, with only minor changes for style and clarity.

38(c) Requests for Original-Creditor Information

FDCPA section 809(b) provides that, if a consumer requests the name and address of the original creditor in writing within 30 days of receiving the validation information or notice described in FDCPA section 809(a), the debt collector must cease collection of the debt until the debt collector obtains and mails that information to the consumer.[532] Proposed § 1006.38(c) would implement and interpret this requirement.

In general, proposed § 1006.38(c) mirrors the statute, with minor changes for style and clarity. However, to accommodate various electronic media through which a debt collector could send original-creditor information under proposed § 1006.42, proposed § 1006.38(c) would interpret FDCPA section 809(b) to require debt collectors to ''provide,'' rather than to ''mail,'' original-creditor information to consumers in a manner consistent with the delivery provisions in proposed § 1006.42. As described above, the Bureau proposes this interpretation to harmonize FDCPA section 809(b)'s writing requirement with the E-SIGN Act. The Bureau requests comment on proposed § 1006.38(c) and on whether to clarify further how to interpret proposed §§ 1006.38(c) and 1006.42 together.

38(d) Disputes

38(d)(1) Failure To Dispute

FDCPA section 809(c) provides that a consumer's failure to dispute a debt may not be construed by any court as an admission of liability by the consumer.[533] Proposed § 1006.38(d)(1) would implement FDCPA section 809(c) and generally restates the statute, with only minor changes for style.

38(d)(2) Response to Disputes

FDCPA section 809(b) provides that, if a consumer disputes a debt in writing within 30 days of receiving the validation information or notice described in section 809(a), the debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector obtains verification of the debt or a copy of a judgment and mails it to the consumer.[534] Proposed § 1006.38(d) would implement and interpret this requirement as follows.

38(d)(2)(i)

Proposed § 1006.38(d)(2)(i) would implement FDCPA section 809(b)'s general requirements regarding disputes and verification. Proposed § 1006.38(d)(2)(i) generally mirrors the statute, with minor changes for style and clarity. However, to accommodate various electronic media through which a debt collector could send a copy of verification or a judgment under proposed § 1006.42, proposed § 1006.38(d)(2)(i) would interpret FDCPA section 809(b) to require debt collectors to ''provide,'' rather than to ''mail,'' such information to consumers in a manner consistent with the delivery provisions in proposed § 1006.42. As described above, the Bureau proposes this interpretation to harmonize FDCPA section 809(b)'s writing requirement with the E-SIGN Act. The Bureau requests comment on proposed § 1006.38(d)(2)(i) and on whether to clarify further how to interpret proposed §§ 1006.38(d)(2)(i) and 1006.42 together. The Bureau also requests comment on whether to clarify that a debt collector who ceases collection of a debt in response to a consumer's written dispute may communicate with the consumer one additional time to inform the consumer that the debt collector is ceasing collection of the debt.[535]

38(d)(2)(ii)

Proposed § 1006.38(d)(2)(ii) would establish an alternative way for debt collectors to respond to disputes that they reasonably conclude are duplicative disputes, as that term is defined in proposed § 1006.38(a)(1).

Some members of the debt collection industry have described being overwhelmed by the number of repeat disputes they receive. In response to the Bureau's ANPRM, some industry commenters estimated that between 10 and 20 percent of consumer disputes reiterate, without providing any new supporting information, earlier disputes to which debt collectors have already responded.[536] An industry commenter also estimated that, for medical debts, the percentage of repeat disputes may be as high as 50 or 60 percent of all disputes. Members of the debt collection industry have also expressed uncertainty about how FDCPA section 809(b)—which, as discussed above, requires a debt collector who receives a written dispute within the validation period to cease collecting the debt, or any disputed portion of the debt, until it provides the consumer with a copy either of verification of the debt or of a judgment—applies to repeat disputes. This uncertainty may drive up costs for debt collectors and harm consumers. Some debt collectors, for example, may spend time and resources re-investigating identical disputes and resending identical verification before continuing with collections. This may leave debt collectors with fewer resources to investigate and respond to non-repeat disputes. It may also impede the collection of legitimate debts.[537]

The challenges that repeat disputes can pose to industry and consumers are not unique to the debt collection market, and the Bureau has clarified the treatment of repeat disputes in other contexts. Under Regulation X, 12 CFR 1024.35(g)(1)(i), for example, a mortgage servicer is not required to comply with certain error resolution requirements when the asserted error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its obligations under the rule, unless the borrower provides new and material information to support the notice of error. Similarly, under Regulation V, 12 CFR 1022.43(f)(1)(ii), a furnisher of information to a consumer reporting

insist that the collector verify the debt, and not a *grace* period within which collection efforts are prohibited'' but that ''[t]he collection agency must ensure, however, that its collection activity does not overshadow and is not inconsistent with the disclosure of the consumer's right to dispute the debt specified by [s]ection 809(a).'').

[532] *Id.*

[533] 15 U.S.C. 1692g(c).

[534] 15 U.S.C. 1692g(b).

[535] Such a clarification would be consistent with the FTC's position in its October 5, 2007 advisory opinion regarding the same topic. *See* Fed. Trade Comm'n, Advisory Opinion to ACA International (Oct. 5, 2007), *https://www.ftc.gov/sites/default/files/documents/public_statements/debt-collector-informing-consumer-who-has-disputed-debt-its-collection-efforts-have-ceased-would-not./p064803fairdebt.pdf.*

[536] These figures appear to include both repeat disputes filed within the 30-day validation period and repeat disputes filed outside of the 30-day validation period. As noted in the section-by-section analysis of proposed § 1006.38(a)(1), the definition of duplicative disputes would include only disputes filed within the validation period. As also noted in that section-by-section analysis, the Bureau requests comment on the percentage of repeat disputes that would qualify as duplicative disputes under the proposed definition of duplicative dispute.

[537] *See, e.g., Hawkins-El* v. *First Am. Funding, LLC,* 891 F. Supp. 2d 402, 410 (E.D.N.Y. 2012) (''Plaintiff cannot forestall collection efforts by repeating the same unsubstantiated assertions and thereby contend that the debt is 'disputed.' If Plaintiff were permitted to do so, debtors would be able to prevent collection permanently by sending letters, regardless of their merit, stating that the debt is in dispute. Such a result is untenable, as it would make debts effectively uncollectable.''); *Derisme* v. *Hunt Leibert Jacobson P.C.,* 880 F. Supp. 2d 339, 370–71 (D. Conn. 2012) (''To allow a consumer to [repeatedly dispute a debt and repeatedly receive verification] would lead to the illogical result that a consumer could avoid paying its debt by repeatedly disputing the debt.'').

agency is not required to investigate a direct dispute if the dispute is substantially the same as a previous dispute with respect to which the furnisher has already satisfied the applicable reinvestigation requirements, unless the dispute includes certain information not previously provided to the furnisher. Just as the Bureau's regulations outline a process for responding to repeat disputes in the mortgage servicing and credit reporting context, the Bureau proposes to outline a process pursuant to which debt collectors may respond to duplicative disputes in a less burdensome way.

Consumers may submit repeat disputes for various reasons. Some may do so to avoid paying debts they owe or because they disagree with the outcome of the earlier dispute. Others may do so because they are unfamiliar with the dispute process. For example, some consumers who submit repeat disputes may not know that they can include supporting documentation with their disputes. Knowing if and why debt collectors might regard a dispute as duplicative may help consumers prepare clearer, more specific disputes. Those disputes, in turn, could improve the accuracy of the information in the debt collection system and help to ensure that debt collectors collect the right amounts from the right consumers. This could be achieved, for example, through a consumer notice requirement.

Other Bureau rules that address repeat disputes contain consumer notice provisions. Under Regulation X, 12 CFR 1024.35(g)(2), for example, a mortgage servicer who determines that a notice of error is substantially the same as an error previously asserted by the borrower for which the servicer has previously complied with its error resolution obligations under the rule must notify the borrower of its determination and provide the basis for that determination. Similarly, under Regulation V, 12 CFR 1022.43(f)(2), a furnisher who determines that a direct dispute is substantially the same as a previous dispute for which the furnisher has already satisfied the applicable reinvestigation requirements must notify the consumer of its determination, provide the reasons for that determination, and identify any information required to investigate the disputed information.

For these reasons, proposed § 1006.38(d)(2)(ii) would provide that, upon receipt of a duplicative dispute, as defined in § 1006.38(a)(1), a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector either: Notifies the consumer in writing or electronically in a manner permitted by § 1006.42 that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer to the debt collector's response to the earlier dispute; or satisfies § 1006.38(d)(2)(i). The Bureau proposes § 1006.38(d)(2)(ii) to clarify that debt collectors are not required to expend resources conducting repetitive dispute investigations unless there is a reasonable basis for re-opening a prior investigation because of new and material information.

Proposed comment 38(d)(2)(ii)–1 explains that a debt collector complies with the requirement to provide a brief statement of the reasons for its determination that the dispute is duplicative if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute. Proposed comment 38(d)(2)(ii)–1 also explains that a debt collector complies with the requirement to refer the consumer to the debt collector's response to the earlier dispute if the notice states that the debt collector responded to the earlier dispute and provides the date of that response.

The Bureau requests comment on proposed § 1006.38(d)(2)(ii) and proposed comment 38(d)(2)(ii)–1, including on whether any additional clarification is needed. In particular, the Bureau requests comment on how debt collectors currently handle repeat disputes and the costs to debt collectors of doing so, distinguishing, to the extent possible, between repeat disputes filed during the validation period and repeat disputes filed after the validation period. The Bureau also requests comment on whether, in responding to disputes that would qualify as duplicative disputes under the proposed rule, debt collectors expect to use the method in proposed § 1006.38(d)(2)(i) or the method in proposed § 1006.38(d)(2)(ii), as well as the expected costs and benefits of using each method. In addition, the Bureau requests comment on the risks to consumers, if any, posed by proposed § 1006.38(d)(2)(ii).

The Bureau proposes § 1006.38(d)(2)(ii) to implement and interpret FDCPA section 809(b). In particular, proposed § 1006.38(d)(2)(ii) interprets what it means for a debt collector to ''obtain[ ] verification of the debt or any copy of a judgment'' and to provide a ''copy of such verification or judgment'' to the consumer when the debt collector reasonably determines that a dispute is a duplicative dispute. In circumstances where a consumer submits a timely written dispute that is duplicative of an earlier dispute for which the debt collector already obtained and mailed to the consumer a copy of verification of the debt or a judgment, the Bureau interprets FDCPA section 809(b)'s requirement to provide a ''copy of such verification or judgment'' to the consumer to mean that a debt collector must provide the consumer either with another copy of the materials the debt collector provided in response to the earlier dispute, or with a notice explaining the reasons for the debt collector's determination that the dispute is duplicative and referring the consumer to the materials the debt collector provided in response to the earlier dispute.

The Bureau also proposes the notice requirement of proposed § 1006.38(d)(2)(ii) pursuant to its authority under Dodd-Frank section 1032(a). As discussed above, Dodd-Frank Act section 1032(a) provides that the Bureau ''may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.'' The Bureau proposes § 1006.38(d)(2)(ii)'s notice requirement on the basis that a debt collector's decision to treat a dispute as a duplicative dispute under proposed § 1006.38(d)(2)(ii) is a feature of debt collection. Knowing that a debt collector has determined that a dispute is a duplicative dispute, and the reasons for that determination, may help a consumer understand the costs, benefits, and risks associated with filing additional disputes and deciding whether to pay a debt.

Section 1006.42 Providing Required Disclosures

42(a) Providing Required Disclosures

42(a)(1) In General

The proposed rule would require debt collectors to provide certain disclosures to consumers. Proposed § 1006.42(a)(1) would require a debt collector who provides such required disclosures in writing or electronically to do so: (1) In a manner that is reasonably expected to provide actual notice to the consumer, and (2) in a form that the consumer may keep and access later. The first prong of proposed § 1006.42(a)(1) would not require a debt collector to ensure a consumer's actual receipt of required

disclosures; it would require instead a reasonable expectation of actual notice. The second prong would require a debt collector, when providing a required disclosure in writing or electronically, to provide it, for example, in a form that the consumer could print or, in the case of disclosures provided by hyperlink to a website, in a form that consumers could access for a reasonable period of time.[538]

Proposed comment 42–1 explains how a debt collector could comply with the general delivery standard in the decedent debt context. The proposed comment provides that, if a debt collector knows or should know that a consumer is deceased, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.42.[539]

Proposed comment 42(a)(1)–1 would clarify that a debt collector who provides a required disclosure in writing or electronically and who receives a notice that the disclosure was not delivered has not provided the disclosure in a manner that is reasonably expected to provide actual notice under § 1006.42(a)(1).

Proposed § 1006.42(a)(1) would apply only if a debt collector provides required disclosures in writing or electronically; it would not apply if a debt collector provides required disclosures orally. Apart from disclosures that a communication is from a debt collector or is for a debt collection purpose—which proposed § 1006.42(a)(2) would exclude from the general delivery standard [540]—the Bureau has not identified widespread instances of debt collectors providing required disclosures, such as the validation information, orally. In addition, the Bureau's proposal would require debt collectors to include more information in validation notices than they may currently provide, which may further decrease the likelihood that debt collectors would deliver such disclosures orally. For these reasons, the Bureau's proposal focuses on clarifying general delivery requirements only for required disclosures delivered electronically or in writing. The Bureau requests comment on this approach, including on whether the Bureau should address oral delivery of required disclosures and, if so, what standards should apply, including how an oral disclosure could be provided in a form that the consumer may keep and access later. The Bureau also requests comment on the frequency with which debt collectors provide required disclosures orally today and the frequency with which debt collectors would expect to provide disclosures orally under the proposed rule.

Proposed § 1006.42(a)(1) also would not apply to any non-required debt collection communications, such as emails that contain only a request for payment. The Bureau requests comment on proposed § 1006.42(a)(1) and on proposed comments 42–1 and 42(a)(1)–1, including on whether any additional clarification is needed as to this general standard and on its costs to debt collectors and benefits to consumers. In particular, the Bureau requests comment on the current practices of debt collectors upon learning that a consumer has not received a required disclosure—for example, because the disclosure has been returned as undeliverable—as well as the risks, costs, and benefits that these practices pose to consumers and industry. The Bureau also requests comment on whether a delivery method that does not satisfy proposed § 1006.42(a)(1)'s notice requirement should be permitted as long as the debt collector confirms that the consumer received actual notice.

The Bureau proposes § 1006.42(a)(1) to implement and interpret FDCPA section 809(a) and (b) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. Under FDCPA section 809(a), a debt collector must ''send the consumer'' a written validation notice unless the information is ''contained in the initial communication'' with the consumer, and under FDCPA section 809(b), a debt collector must ''mail[ ] to the consumer'' any original-creditor or verification information the debt collector provides. The Bureau proposes to require a form of delivery that is reasonably expected to provide actual notice on the basis that such a requirement is implicit in the concepts of ''send[ing] the consumer a written notice,'' information being ''contained in'' the initial communication, and ''mail[ing]'' information to the consumer.[541] Similarly, the Bureau proposes to require a form of delivery that the consumer may keep and access later on the basis that such a requirement is also implicit in the concepts of ''send[ing] the consumer a written notice,'' information being ''contained in'' the initial communication, and ''mail[ing]'' information to the consumer—requirements traditionally satisfied through sending a paper document but that the Bureau is now adapting to electronic communications.

The Bureau also proposes § 1006.42(a)(1) as an interpretation of FDCPA section 808's prohibition on using unfair or unconscionable means to collect a debt. It may be unfair or unconscionable under FDCPA section 808 for a debt collector to deliver a disclosure using a method that is not reasonably expected to provide actual notice to the consumer or that does not allow the consumer to retain the disclosure and access it later. If debt collectors deliver disclosures in a manner that does not meet these standards, consumers may not receive required information or have it available for future reference, potentially leading them to take different actions with respect to debts than they otherwise would have. A debt collector's decision to provide a required disclosure in a manner not reasonably expected to provide actual notice or in a form that the consumer cannot keep and access later is outside of a consumer's control; therefore, a consumer cannot reasonably avoid the injury caused by a debt collector who provides a required disclosure in such a manner or form. In addition, as noted, providing required disclosures in a manner not reasonably expected to provide actual notice or in a form that the consumer cannot keep and access later could effectively thwart FDCPA section 809's validation notice, original-creditor, and dispute-verification provisions. Thus, whatever benefits debt collectors may receive from such conduct do not appear to be outweighed by the costs to consumers.

42(a)(2) Exceptions

Although proposed § 1006.42(a)(1) generally requires that debt collectors

[538] See the section-by-section analysis of proposed § 1006.42(c)(2)(ii). For ease of reference, throughout the section-by-section analysis of proposed § 1006.42, the Bureau uses the shorthand term ''retainability'' to refer to the consumer's ability to keep and access a disclosure later.

[539] Proposed comment 42–1 is consistent with proposed comments 34(a)(1)–1 and 38–1, which also would clarify delivery standards in the decedent debt context.

[540] See the section-by-section analysis of proposed § 1006.42(a)(2).

[541] There is support for this interpretation in court decisions. *See, e.g., Lavallee* v. *Med-1 Solutions, LLC,* No. 1:15–cv–01922–DML–WTL, 2017 WL 4340342, at *4 (S.D. Ind. Sept. 29, 2017) (''[I]f notice is not sent in a manner in which receipt should be presumed as a matter of logic and common experience, then it cannot be considered to have been 'sent'.''); *Johnson* v. *Midland Credit Mgmt. Inc.,* No. 1:05 CV 1094, 2006 WL 2473004, at *12 (N.D. Ohio Aug. 24, 2006) (''[W]hen a written notice is returned as undeliverable, it has not actually been *sent* to the *consumer.* Rather, it has been *sent* to an *improper address* for the consumer. . . . If the debt collector knows the validation notice was sent to the wrong address, the debt collector has not complied with the plain language of the statute.'').

provide required disclosures in a manner reasonably expected to provide actual notice and in a form consumers can keep and access later, proposed § 1006.42(a)(2) identifies two circumstances in which a debt collector would not need not to comply with proposed § 1006.42(a)(1) in providing required disclosures. The first circumstance involves the disclosure required by proposed § 1006.6(e); the second circumstance involves the disclosure required by proposed § 1006.18(e).

Proposed § 1006.6(e) would require a debt collector who communicates or attempts to communicate with a consumer electronically using a particular email address, telephone number for text messages, or other electronic-medium address to include in each such communication or attempt to communicate a clear and conspicuous statement describing how the consumer can opt out of further electronic communications or attempts to communicate to that address or telephone number. Proposed § 1006.18(e) would require a debt collector to disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information obtained with be used for that purpose, and to disclose in each subsequent communication that the communication is from a debt collector.

The disclosures that would be required by proposed §§ 1006.6(e) and 1006.18(e) would accompany all electronic debt collection communications. Thus, absent an exception for these provisions, proposed § 1006.42(a)(1) would apply to all electronic debt collection communications. This, in turn, would mean that all electronic debt collection communications effectively would have to meet the notice and retainability requirements of § 1006.42(a)(1)—including even relatively routine communications, such as ones that convey settlement offers, payment requests, scheduling messages, and other information not required by the FDCPA or Regulation F. The Bureau believes that requiring all such communications to be provided in a manner reasonably expected to provide actual notice and in a form consumers can keep and access later is likely to impose an unnecessary burden on debt collectors with little corresponding benefit to consumers.

As discussed above, the Bureau proposes § 1006.42(a)(1) as an interpretation of certain terms in FDCPA section 809 and pursuant to FDCPA section 808. Because the disclosures in proposed §§ 1006.6(e) and 1006.18(e) do not arise under FDCPA section 809, and because they may not implicate FDCPA section 808's prohibition on using unfair or unconscionable means to collect or attempt to collect any debt, the Bureau proposes generally to except them from the requirements of § 1006.42(a)(1). For this reason, proposed § 1006.42(a)(2) provides that a debt collector need not comply with § 1006.42(a)(1) when providing the disclosure required by § 1006.6(e) or § 1006.18(e) in writing or electronically, unless the disclosure is included on a notice required by § 1006.34(a)(1)(i) or § 1006.38(c) or (d)(2), or in an electronic communication containing a hyperlink to such a notice. Any disclosure provided pursuant to proposed § 1006.6(e) or § 1006.18(e), however, would need to be provided clearly and conspicuously. This clear-and-conspicuous requirement would apply even where proposed § 1006.42(a)(1) would not. The Bureau requests comment on proposed § 1006.42(a)(2), including whether the exceptions identified in proposed § 1006.42(a)(2) are underinclusive or overinclusive.

42(b) Requirements for Certain Disclosures Provided Electronically

The FDCPA requires three disclosures to be provided in writing. As the Bureau proposes to implement them in Regulation F, these disclosures are: (1) The validation notice described in proposed § 1006.34(a)(1)(i)(B); (2) the original-creditor disclosure described in proposed § 1006.38(c); and (3) the validation-information disclosure described in proposed § 1006.38(d)(2).[542] The Bureau interprets the FDCPA's writing requirement to permit these disclosures to be provided electronically.[543] If provided electronically, however, they are subject to the E-SIGN Act, the Federal statute that provides standards for when delivery of a disclosure by electronic record satisfies a requirement in a statute, regulation, or other rule of law that the disclosure be provided or made available to a consumer in writing.[544] Proposed § 1006.42(b) lists the requirements that debt collectors would need to follow to satisfy proposed § 1006.42(a)(1) and, relatedly, the E-SIGN Act, when providing these disclosures electronically. As discussed below, each requirement described in proposed § 1006.42(b) addresses either the actual notice or retainability aspect of proposed § 1006.42(a), or both. Unless otherwise noted, the Bureau proposes § 1006.42(b) for the same reasons and pursuant to the same authority discussed in the section-by-section analysis of proposed § 1006.42(a)(1).

The Bureau requests comment on proposed § 1006.42(b), including on the frequency with which debt collectors currently provide required disclosures electronically, and the proportion of such disclosures provided by email, text message, and other electronic means. To the extent debt collectors do not currently provide required disclosures electronically, the Bureau requests comment on why that is so. The Bureau also requests comment on whether to require that debt collectors who provide required disclosures electronically maintain reasonable written policies and procedures designed to ensure that debt collectors comply with the requirements of proposed § 1006.42(b).[545] Several Bureau rules include similar policies-and-procedures requirements.[546] Requiring such policies and procedures may facilitate compliance with proposed § 1006.42(b) by debt collectors who provide required disclosures electronically, and may promote effective and efficient enforcement and supervision by the Bureau and other Federal agencies. However, requiring such policies and

[542] For ease of reference, throughout the section-by-section analysis of proposed § 1006.42, the Bureau refers to these three disclosures as the ''required disclosures.'' The disclosure required by FDCPA section 807(11) must be in writing only if the debt collector otherwise is communicating with the consumer in writing. As discussed in the section-by-section analysis of proposed § 1006.42(a)(2), the Bureau proposes to exclude FDCPA section 807(11) written disclosures from meeting the delivery requirements in proposed § 1006.42(a)(1) unless the disclosures are included on a notice required by §§ 1006.34(a)(1)(i) or 1006.38(c) or (d)(2), or in an electronic communication containing a hyperlink to such a notice.

[543] See the section-by-section analyses of proposed §§ 1006.34 and 1006.38.

[544] *See* 15 U.S.C. 7001–7006.

[545] Such a requirement could be based on the Bureau's authority under Dodd-Frank Act sections 1022(b)(1) or 1024(b)(7) or both.

[546] *See, e.g.,* Regulation E, 12 CFR 1005.33(g) (requiring remittance transfer providers to ''develop and maintain written policies and procedures that are designed to ensure compliance with the error resolution requirements applicable to remittance transfers under this section''); Regulation X, 12 CFR 1024.38(a) (requiring mortgage servicers to ''maintain policies and procedures that are reasonably designed to achieve'' certain objectives); Regulation Z, 12 CFR 1026.36(j) (requiring depository institutions to ''establish and maintain written policies and procedures reasonably designed to ensure and monitor the compliance of the depository institution, its employees, its subsidiaries, and its subsidiaries' employees'' with certain requirements of the rule); *id.* 1026.51 (requiring card issuers to ''establish and maintain reasonable written policies and procedures to consider the consumer's ability to make the required minimum payments under the terms of the account based on a consumer's income or assets and a consumer's current obligations'').

procedures could impose costs on debt collectors, which, if passed on to creditors, could ultimately reduce consumers' access to credit. The Bureau therefore requests comment on the expected costs and benefits of requiring debt collectors who provide required disclosures electronically to maintain reasonable written policies and procedures designed to comply with the requirements of proposed § 1006.42(b).

42(b)(1)

The proposed rule would provide debt collectors with a choice between two general options for providing the required disclosures electronically. The first option would be to comply with the E-SIGN Act after the consumer provides affirmative consent directly to the debt collector. The second option would be to comply with the alternative procedures described in proposed § 1006.42(c). As explained in this section-by-section analysis (discussing the proposed E-SIGN Act option) and the section-by-section analysis of proposed § 1006.42(c) (discussing the proposed alternative procedures), a debt collector who satisfies the requirements of either option has taken necessary but not sufficient actions to support a finding that the debt collector has provided the electronic disclosure in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later.[547]

Regarding the E-SIGN Act option, E-SIGN Act section 101(c) sets forth a detailed process for ensuring the consumer's informed, affirmative consent before delivering disclosures electronically.[548] Before a consumer may consent to electronic delivery, the consumer must receive a clear and conspicuous statement of: (1) The consumer's right not to consent and to withdraw consent; (2) the scope of the consumer's consent, including whether it applies only to the particular transaction which gave rise to the obligation to provide the disclosure or to identified disclosures that may be provided or made available during the course of the parties' relationship; (3) the procedures for withdrawing consent; (4) how the consumer may obtain paper copies of electronic records; and (5) any hardware and software requirements for access to and retention of electronic records.[549] The consumer must consent electronically, or confirm the consumer's consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.[550] In light of these requirements, a debt collector who delivers required disclosures electronically in accordance with E-SIGN Act section 101(c) (and who satisfies § 1006.42(b)(2) through (4)) may reasonably expect to have provided the consumer with actual notice in a form that the consumer may keep and access later.

The proposed rule would clarify that, to deliver disclosures electronically in accordance with E-SIGN Act section 101(c), a debt collector must obtain affirmative consent directly from the consumer. The Bureau proposes this requirement as an interpretation of E-SIGN Act section 101(c), pursuant to its authority under E-SIGN Act section 104(b)(1)(A) to interpret the E-SIGN Act through regulations.[551] E-SIGN Act section 101(c) permits electronic delivery of required disclosures if, among other things, the consumer ''has affirmatively consented to such use and has not withdrawn such consent.'' The E-SIGN Act does not state that, in the debt collection context, a debt collector may rely on E-SIGN Act consent provided by the consumer to the original creditor or person to whom the debt is owed. Rather, the E-SIGN Act generally limits the consumer's consent to ''records provided or made available during the course of the parties' relationship'' or ''only to the particular transaction which gave rise to the obligation to provide the record.'' [552]

In the debt collection context, the Bureau interprets ''the parties' relationship'' to exclude a debt collector with whom the creditor may eventually place the account, because the consumer and the debt collector typically have no relationship at the time the consumer provides E-SIGN Act consent to the creditor. Indeed, the consumer likely does not know the identity of the debt collector the creditor may hire, and the creditor may not know either. In the debt collection context, the Bureau also interprets ''only the particular transaction which gave rise to the obligation to provide the record'' to exclude interactions between the consumer and the debt collector with whom the creditor may eventually place the account. The statute uses the word ''only'' before referring to ''the particular transaction,'' suggesting that the relevant transaction is limited and occurs within the confines of the ''parties' relationship.'' Accordingly, the Bureau does not propose to interpret a consumer's affirmative consent to receive electronic disclosures from a creditor under the E-SIGN Act as affirmative consent to receive electronic disclosures from a debt collector under the E-SIGN Act. Instead, the Bureau proposes to interpret E-SIGN Act section 101(c) to require that a consumer's consent be given directly to the debt collector. The Bureau's proposed interpretation is consistent with several FDCPA provisions pertaining to consumer consent for certain debt collection communications,[553] as well as the ANPRM comments of several industry participants and consumer advocates.

For these reasons, proposed § 1006.42(b)(1) would, except as provided in § 1006.42(c), require a debt collector to provide the required disclosures in accordance with section 101(c) of the E-SIGN Act after the consumer provides affirmative consent directly to the debt collector. The Bureau proposes to codify this interpretation of the E-SIGN Act in comment 42(b)(1)–1. The Bureau requests comment on proposed § 1006.42(b)(1) and on proposed comment 42(b)(1)–1, including on the extent to which debt collectors currently obtain E-SIGN Act consent directly from the consumer. If debt collectors currently do not obtain such consent, the Bureau requests comment on the reasons why not and on any specific circumstances in which debt collectors rely instead upon consent the consumer originally provided to the creditor under the E-SIGN Act. The Bureau also requests comment on whether to permit such reliance, or transfer of consent, in

[547] The debt collector still would need to satisfy the requirements in proposed § 1006.42(b)(2) through (4).

[548] 15 U.S.C. 7001(c).

[549] *Id.*

[550] *Id.* Further, after providing consent, if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record must provide the consumer with new disclosures and the consumer must provide new consent. *Id.*

[551] *See* 15 U.S.C. 7004(b)(1). The Bureau's proposed interpretation of E-SIGN Act section 101(c) is ''with respect to'' the FDCPA within the meaning of E-SIGN Act section 104(b). The proposed interpretation is therefore limited to disclosures required under Regulation F, which must be provided in the name of and on behalf of the FDCPA-covered debt collector. The Bureau does not propose to issue an interpretation applicable to disclosures required by other statutes or regulations, including where third parties may provide disclosures in the name of or on behalf of the creditor.

[552] 15 U.S.C. 7001(c)(1)(B)(ii).

[553] *See* 15 U.S.C. 1692c(a) (permitting certain communications with ''the prior consent of the consumer given directly to the debt collector''); 15 U.S.C. 1692c(b) (same).

certain specific circumstances and, if so, what those circumstances should be.

42(b)(2)

Proposed § 1006.42(b)(2) provides that, to comply with § 1006.42(a)(1) when providing the required disclosures electronically, a debt collector also must identify the purpose of the communication. Proposed § 1006.42(b)(2) seeks to increase the likelihood that a consumer who receives an electronic debt collection disclosure can distinguish the communication from junk mail or ''spam.'' [554] Reports estimate that over 200 billion emails are sent and received worldwide each day [555] and that spam accounts for over half of all email traffic.[556] Given the volume of information, including spam, transmitted by email, the likelihood that consumers will receive actual notice of emailed debt collection disclosures may depend, in part, on their ability to distinguish between the debt collector's communication transmitting the disclosure and spam.

According to one recent study, the two most important factors in a consumer's decision to open an email are whether the consumer recognizes the sender and whether the email includes a relevant subject line.[557] At the outset of collections, a consumer may not recognize the name of a debt collector who sends an email or text message. The subject line of an email, or the first line of a text message, may therefore be an especially important means of alerting consumers to important debt collection communications. To address the spam problem, many email providers and third parties have developed sophisticated filters to help consumers identify and segregate potential spam messages.[558] There may be a risk that such filters will erroneously identify a legitimate debt collection communication as spam. Using a specific, informative subject line may decrease that risk.[559]

For these reasons, proposed § 1006.42(b)(2) would require a debt collector to identify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the required disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount. Including limited but relevant information about the creditor and the debt in the subject line of an email, or in the first line of a text message, may improve a consumer's ability to distinguish the communication from spam or junk, and therefore may increase the likelihood that the consumer will receive actual notice within the meaning of proposed § 1006.42(a)(1).[560]

Because the amount of the debt may change over time as interest and fees accrue, including the current amount of the debt in the subject line of an email or the first line of a text message, without further itemization, may not help the consumer recognize a debt that belongs to the consumer or that the communication pertains to debt collection. Proposed comment 42(b)(2)–1 provides examples of information identifying the debt, other than the amount, that a debt collector could use to comply with proposed § 1006.42(b)(2). These include a truncated account number, the name of the original creditor, the name of any store brand associated with the debt, the date of sale of a product or service giving rise to the debt, the physical address of service, and the billing address on the account.

The Bureau requests comment on proposed § 1006.42(b)(2) and on proposed comment 42(b)(2)–1. In particular, the Bureau requests comment on the risk that an email provider's spam filter may prevent a debt collector's email from reaching a consumer's inbox, including on whether any particular words or phrases in the subject line of an email are likely to cause a spam filter to identify a legitimate debt collection communication as spam and on whether debt collectors should be required to take any other steps to decrease the likelihood that an email will be filtered as spam. The Bureau also requests comment on whether any particular words or phrases in the subject line of an email or in the first line of a text message are likely to help consumers distinguish between spam and debt collection communications. In addition, the Bureau requests comment on the risks to consumers, if any, of including the name of the creditor to whom the debt is owed, a truncated account number, the date of sale of a product or service giving rise to the debt, the physical address of service, the billing address, or any other particular item of information in the subject line of an email or in the first line of a text message. The Bureau also requests comment on how consumers handle emails marked as spam, including on the frequency with which consumers review their spam folders to identify emails they should read, and the extent to which major email providers delete unread emails in spam folders.

42(b)(3)

Proposed § 1006.42(b)(3) describes a third requirement that a debt collector would need to satisfy to comply with proposed § 1006.42(a)(1) when providing the required disclosures electronically. Just as a debt collector who sends a paper letter by postal mail may receive notice that the letter was undeliverable, a debt collector who sends an email or a text message may receive notice from a communications carrier that the email or text message was undeliverable. This notice often takes the form of an automated message. Proposed § 1006.42(b)(3) would require a debt collector to permit receipt of notifications of undeliverability from communications providers, monitor for any such notifications, and treat any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt.

The Bureau proposes this requirement because it appears unreasonable for a debt collector to expect that a consumer has actual notice of an electronic disclosure if that disclosure has been returned as undelivered. There is support for this interpretation in court decisions. For example, in a similar context, courts have held that a paper validation notice sent to the consumer by postal mail but returned to the debt collector as undeliverable was not actually sent to the consumer within the

[554] The term ''spam'' generally refers to unsolicited commercial email. *See, e.g.,* 15 U.S.C. 7701(a)(2) (finding, in connection with CAN–SPAM Act of 2003, that ''[t]he convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail.'').

[555] Radicati Grp., Inc., *Email Statistics Report, 2015–19, Executive Summary,* at 3–4 (Mar. 2015), *https://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf.*

[556] Symantec, *internet Security Threat Report,* at 24 (Apr. 2017), *https://www.symantec.com/content/dam/symantec/docs/reports/istr-22-2017-en.pdf.*

[557] Direct Mktg. Ass'n, *Consumer Email Tracker 2017,* at 18 (2017),*https://dma.org.uk/uploads/misc/5a1583ff3301a-consumer-email-tracking-report-2017-(2)_5a1583ff32f65.pdf.*

[558] *See, e.g.,* Todd Jackson, *How Our Spam Filter Works,* Official Gmail Blog (Oct. 31, 2007), *https://gmail.googleblog.com/2007/10/how-our-spam-filter-works.html.*

[559] *See, e.g.,* IBM, *Which keywords or characters can trigger spam filters?,* IBM Knowledge Ctr., *https://www.ibm.com/support/knowledgecenter/en/SSWU4L/Email/imc_Email/List_of_Keywords-Characters_Which_Can_Tr190.html* (last visited May 6, 2019).

[560] As explained in the section-by-section analysis of proposed § 1006.42(b)(1), (c)(1), and (e)(2), the email or text message can only be sent to an email address or telephone number that satisfies certain criteria. Those criteria are designed to ensure that the email address or telephone number is one the consumer actually used, thereby limiting privacy concerns.

meaning of FDCPA section 809(a).[561] The Bureau requests comment on proposed § 1006.42(b)(3), including on how a debt collector who attempts to deliver a required disclosure electronically may become aware that the disclosure has not been delivered. The Bureau also requests comment on whether debt collectors should be required to take any steps in addition to those described in proposed § 1006.42(b)(3).

42(b)(4)

Proposed § 1006.42(b)(4) describes an additional step that a debt collector must take to comply with proposed § 1006.42(a)(1). Proposed § 1006.42(b)(4) would apply only when a debt collector provides electronically the validation notice described in proposed § 1006.34(a)(1)(i)(B). Proposed § 1006.42(b)(4) seeks to ensure that debt collectors provide the validation notice in a format that is compatible with the range of commercially available electronic devices a consumer may use to view the disclosure.

According to recent research, smartphone ownership has doubled since 2011, and today a larger share of consumers own a smartphone (77 percent) than a desktop or laptop computer (73 percent).[562] In addition, roughly half of all consumers own a tablet computer.[563] As a result, consumers may view disclosures on a variety of screen sizes. A disclosure that automatically adjusts to the size of the consumer's screen is sometimes called a ''responsive'' disclosure. If a consumer views a disclosure using a device to which the disclosure is not responsive, the disclosure may appear in small text with truncated margins; in some cases, the disclosure may be difficult for the consumer to read and navigate. In addition, some research suggests that mobile-friendly design may improve consumer attention to digital information.[564] Consistent with these considerations, the Bureau's 2016 final rule concerning prepaid accounts under Regulations E and Z (2016 Prepaid Final Rule) requires financial institutions to provide electronic disclosures required by that rule in a form that is responsive to different screen sizes.[565]

Given the prevalence of mobile technology, it may be unreasonable for a debt collector to expect that a consumer has actual notice of an electronic disclosure that does not adjust to the screen size of the consumer's mobile device. On smaller screens, such a disclosure may be illegible if viewed in its entirety. As a result, some information may be lost to consumers. This may be especially true as to disclosures, such as the validation notice described in proposed § 1006.34(a)(1)(i)(B), with formatting elements meant to draw a consumer's attention to particularly important information when the entirety of the disclosure is in view. For example, the validation notice's presentation of information in a tabular format could be lost to consumers using mobile devices if the validation notice is not in a responsive format viewable on smaller screens.

In addition, graphical representations of textual content generally cannot be accessed by assistive technology used by the blind and visually impaired, such as screen readers. Providing electronically-delivered disclosures in machine-readable text may help ensure that consumers who use screen readers can access the information. Thus, unless a debt collector knows that a consumer does not use a screen reader, it also may be unreasonable for a debt collector to expect that a consumer has actual notice of an electronic disclosure that is not machine readable. The Bureau's 2016 Prepaid Final Rule requires financial institutions to provide electronic disclosures required by that rule using machine-readable text that is accessible on screen readers.[566]

To address concerns about readability on mobile devices and accessibility for persons with disabilities, proposed § 1006.42(b)(4) would require a debt collector who provides electronically the validation notice described in § 1006.34(a)(1)(i)(B) to do so in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers.[567] Proposed § 1006.42(b)(4) would apply only to the validation notice described in proposed § 1006.34(a)(1)(i)(B). It would not apply to the original-creditor disclosure described in proposed § 1006.38(c) because that disclosure typically is brief and does not feature standardized information or formatting. It also would not apply to the verification disclosures described in proposed § 1006.38(d)(2). Those disclosures may include images of original paper documents, and it does not appear that commercially available file formats for delivering images electronically could comply with proposed § 1006.42(b)(4). It may therefore be impractical to require debt collectors to provide the verification disclosures in accordance with proposed § 1006.42(b)(4).

Proposed comment 42(b)(4)–1 provides examples of how to satisfy proposed § 1006.42(b)(4). The comment explains that a debt collector provides the validation notice in a responsive format accessible on a screen of any commercially available size if, for example, the notice adjusts to different screen sizes by stacking elements in a manner that accommodates consumer viewing on smaller screens while still meeting the other applicable formatting requirements in proposed § 1006.34. It also explains that a debt collector provides the validation notice in a manner accessible via commercially available screen readers if, for example, the validation notice is machine readable.

The Bureau requests comment on proposed § 1006.42(b)(4) and on proposed comment 42(b)(4)–1. In particular, the Bureau requests comment on the cost to debt collectors of developing and using a validation notice that is responsive to screen size and accessible via screen readers, including the one-time costs of designing such a disclosure and the ongoing costs of populating such a disclosure with information about individual debts. The Bureau also requests comment on how those costs might change if the Bureau provides debt collectors with source code for a version of the validation notice that would comply with proposed § 1006.42(b)(4). In addition, the Bureau requests comment on whether the original-creditor disclosure described in

[561] *See, e.g., Johnson* v. *Midland Credit Mgmt. Inc.,* No. 1:05 CV 1094, 2006 WL 2473004, at *12–13 (N.D. Ohio Aug. 24, 2006) (''[W]hen a written notice is returned as undeliverable, it has not actually been *sent* to the *consumer.* Rather, it has been *sent* to an *improper address* for the consumer. . . . If the debt collector knows the validation notice was sent to the wrong address, the debt collector has not complied with the plain language of the statute.'').

[562] internet & Tech, *Mobile Fact Sheet,* Pew Res. Ctr. (Feb. 5, 2018), *http://www.pewinternet.org/fact-sheet/mobile.*

[563] *Id.*

[564] For example, a 2014 marketing study found that optimizing email messages to be read on a variety of devices boosted the rate at which consumers clicked on hyperlinks. *See* Lauren Smith, *The Science of Email Clicks: The Impact of Responsive Design & Inbox Testing,* Litmus (Dec. 8, 2014), *https://litmus.com/blog/the-science-of-email-clicks-the-impact-of-responsive-design-inbox-testing.*

[565] 12 CFR 1005.18(b)(6)(i)(B); comment 18(b)(6)(i)(B)–2.

[566] 12 CFR 1005.18(b)(6)(i)(B); comment 18(b)(6)(i)(B)–3.

[567] In connection with this proposal, the Bureau intends to make available on its website the source code for a version of the validation notice that would comply with proposed § 1006.42(b)(4). Based on its own feasibility testing of a mail merge process, the Bureau believes that the burden on debt collectors of populating an email based on this source code with transaction data may be low.

proposed § 1006.38(c) and the validation-information disclosure described in proposed § 1006.38(d)(2) should be subject to proposed § 1006.42(b)(4).

42(c) Alternative Procedures for Providing Certain Disclosures Electronically

Under proposed § 1006.42(b)(1), a debt collector who provides the required disclosures electronically must, except as provided in § 1006.42(c), comply with section 101(c) of the E-SIGN Act as interpreted by the Bureau in the proposed rule. Proposed § 1006.42(c) would allow for electronic delivery of the required disclosures outside of the E-SIGN Act's consent process. The Bureau proposes this alternative because debt collectors and consumers may benefit from greater flexibility as to electronic disclosures.

According to industry commenters to the Bureau's ANPRM and to the small entity representatives who participated in the SBREFA process, it is often infeasible for debt collectors to send electronic disclosures for two reasons. First, debt collectors are concerned about violating FDCPA section 805(b)'s limitations on third-party communications when they engage in electronic communications with consumers, an issue the Bureau proposes to address in § 1006.6(d)(3).[568] Second, the process for obtaining E-SIGN Act consent is particularly cumbersome in the debt collection context, where consumers and debt collectors typically lack a pre-existing relationship.

The process for obtaining consumer consent under the E-SIGN Act may impose a substantial burden on electronic commerce in the unique context of debt collection. Most communication between debt collectors and consumers continues to take place by telephone and postal mail, neither of which is well-suited to obtaining E-SIGN Act consent. Section 101(c) of the E-SIGN Act requires that the consumer receive certain disclosures before consenting to electronic delivery. These disclosures may be more than 1,000 words long and, although a debt collector could provide them over the telephone, they could take a considerable amount of time to recite to the consumer. Moreover, on a telephone call, it may be challenging for a consumer to ''reasonably demonstrate[ ]'' the ability to ''access information in the electronic form that will be used to provide the information that is the subject of the consent,'' as required by E-SIGN Act section 101(c)(1)(C)(ii).[569] Similarly, although a debt collector could provide E-SIGN disclosures by postal mail, it is not clear how a consumer could, by postal mail, ''reasonably demonstrate'' the ability to access electronic information.

Thus, even if a debt collector incorporates some elements of the E-SIGN Act consent process into an initial telephone or postal mail communication, the debt collector likely still must rely on the consumer to take the further step of demonstrating the ability to access electronic information. A debt collector may be uncertain whether and when the consumer will take this further step. Such uncertainty may be particularly challenging in connection with delivering the validation notice. Under FDCPA section 809(a) and proposed § 1006.34(a)(1)(i)(B), the debt collector must send the validation notice within five days of the debt collector's initial communication with the consumer, leaving little time for the debt collector to arrange an alternative delivery method if the consumer does not complete the E-SIGN Act consent process soon after receiving the initial communication. While a debt collector could, by introductory letter, ask the consumer to complete the entire E-SIGN Act consent process online, a consumer may be unlikely to respond quickly to such a request from a debt collector with whom the consumer lacks a prior relationship.

Further, it may not be effective for debt collectors to adopt the practice that creditors often use of sending emails or text messages with hyperlinks directing consumers to websites requesting E-SIGN Act consent. Even if the creditor previously identified the debt collector for the consumer,[570] the debt collector would need to send the validation notice within five days of the initial communication, again leaving little time for the debt collector to arrange an alternate delivery method if the consumer does not consent to electronic delivery quickly.[571]

The Bureau is not aware of instances in which a debt collector has delivered a validation notice electronically pursuant to E-SIGN Act consent provided directly to the debt collector. Industry commenters to the Bureau's ANPRM generally stated that debt collectors do not send validation notices electronically. Similarly, a consumer advocate commenter stated that a survey of its members did not find any evidence that debt collectors currently deliver validation notices electronically. However, the consumer advocate commenter also stated that, given the consent requirements of the E-SIGN Act and the timing requirements of the FDCPA, it is conceivable that electronic delivery of validation notices could occur under current law. More recently, the consumer advocate commenter noted that several debt collectors may be delivering validation notices electronically.[572] However, it is unclear how widespread this practice is and whether it involves consumer consent provided directly to the debt collector.[573]

For these reasons, the Bureau proposes § 1006.42(c), which describes procedures a debt collector may use to provide the required disclosures electronically without the need to comply with section 101(c) of the E-SIGN Act. As discussed below, proposed § 1006.42(c)(1) would require a debt collector to send an electronic communication to a particular email address or, in the case of a text message, a particular telephone number. Proposed § 1006.42(c)(2) would provide two methods from which debt collectors could choose for placing a required disclosure in such an electronic communication. A debt collector who follows the procedures described in proposed § 1006.42(c) would satisfy proposed § 1006.42(a)(1)'s requirement to provide the required disclosures in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later, provided that the debt collector also satisfies proposed § 1006.42(b)(2) through (4).

The Bureau proposes § 1006.42(c) pursuant to its authority, under section 104(d)(1) of the E-SIGN Act, to exempt a specified category or type of record from the requirements relating to

[568] See the section-by-section analysis of proposed § 1006.6(d)(3).

[569] *Id.*

[570] See the section-by-section analysis of proposed § 1006.6(d)(3).

[571] As discussed in the section-by-section analysis of proposed § 1006.42(b)(1), the Bureau proposes to interpret the E-SIGN Act to require consent to be provided directly from the consumer to the debt collector.

[572] Similarly, an association of State regulators stated that many technologically sophisticated debt collectors provided disclosures electronically, but it did not provide further details.

[573] Direct consent may be easier to obtain for required disclosures other than the validation notice. For example, in response to the ANPRM, one industry trade association reported that 20 percent of members that responded to a survey delivered verification materials by email and fax. However, this commenter did not identify the proportion sent by email, and it did not indicate whether these debt collectors obtained E-SIGN Act consent directly from the consumer before doing so. Another industry trade association commenting on the ANPRM stated that electronic delivery of verification materials occurs rarely.

consent in section 101(c) of the E-SIGN Act if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.[574] The Bureau proposes the exemption on the basis that requiring debt collectors to comply with the consent requirements in section 101(c) E-SIGN Act may impose a substantial burden on electronic commerce by potentially reducing opportunities for consumers and debt collectors to communicate and resolve debts more quickly; for consumers to submit disputes more easily; and for consumers to make online payments in response to notices delivered electronically. Further, as discussed in part VI, the Bureau estimates that as many as 140 million validation notices are sent annually, almost all by postal mail. As also discussed in part VI, electronic delivery costs may be substantially lower than the costs of printing disclosures and delivering them by postal mail.[575] Given the number of validation notices sent annually, and the unique challenges in the debt collection context of obtaining E-SIGN Act consent to receive them electronically, these printing and mailing costs also may impose a substantial burden on the debt collection industry, which may, in turn, result in increased cost and decreased availability of credit.

The procedures described in proposed § 1006.42(c) are designed so as not to increase the material risk of harm to consumers. Consumers are exposed to a materially increased risk of harm when electronic delivery of the required disclosures by the alternative method would make consumers less likely to receive, identify, open, read, or understand the disclosures, or would increase the likelihood of an unintended third-party disclosure. Pursuant to its E-SIGN Act exemption authority, the Bureau designed each component of proposed § 1006.42(c) to prevent an increase in these risks. For example, as discussed below, the procedures in proposed § 1006.42(c) are designed to help ensure that, among other things, the email address or telephone number to which a debt collector sends a required disclosure or a hyperlink to such a disclosure belongs to the consumer; the consumer is prepared to receive electronic disclosures at that email address or telephone number; the consumer is prepared to view required disclosures electronically, including when provided on a website; and the consumer can retain electronic disclosures.

The Bureau requests comment on proposed § 1006.42(c), including on whether the requirements relating to consent in section 101(c) of the E-SIGN Act—including as the Bureau proposes to interpret them—impose a substantial burden on electronic commerce in the debt collection context, and on whether proposed § 1006.42(c) is necessary and sufficient to eliminate those burdens. With respect to possible burdens on electronic commerce, the Bureau requests information on the costs of delivering required disclosures electronically, how those costs compare to delivering required disclosures on paper, and the broader impacts of increased electronic delivery in the debt collection context. The Bureau also requests comment on whether the procedures described in proposed § 1006.42(c) increase the material risk of harm to consumers and, if so, any adjustments that can be made to mitigate that risk.

42(c)(1)

To help ensure that a consumer receives a required disclosure provided electronically when a debt collector uses the alternative procedures, proposed § 1006.42(c)(1) would require a debt collector to provide the disclosure by sending an electronic communication to an email address or, in the case of a text message, a telephone number that the creditor or a prior debt collector could have used to provide electronic disclosures related to that debt in accordance with section 101(c) of the E-SIGN Act. This may include, for example, an email address or telephone number covered by the consumer's unwithdrawn E-SIGN Act consent provided directly to the creditor or a prior debt collector. The Bureau proposes to exercise its E-SIGN Act exemption authority to limit the email addresses and telephone numbers to which a debt collector may send required disclosures under proposed § 1006.42(c)(1) on the basis that, if a consumer has not provided unwithdrawn E-SIGN Act consent for a particular email address or telephone number to the creditor or a prior debt collector, a new debt collector should not presume that the consumer is able or prepared to receive electronic disclosures at that email address or telephone number.

Proposed comment 42(c)(1)–1 would clarify that, if a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to deliver disclosures under § 1006.42(c). This would be the case even if the consumer provided unwithdrawn E-SIGN Act consent allowing the creditor or an earlier debt collector to use that email address or telephone number.

The Bureau requests comment on proposed § 1006.42(c)(1) and on proposed comment 42(c)(1)–1, including on the risks and benefits of allowing debt collectors to use an email address or telephone number with respect to which the consumer provided to the creditor or a prior debt collector unwithdrawn E-SIGN Act consent related to the debt. The Bureau also requests comment on how often creditors obtain E-SIGN Act consent from consumers and how often consumers withdraw any such consent.

42(c)(2)

Proposed § 1006.42(c)(2) would provide two methods from which debt collectors could choose for placing a required disclosure in an electronic communication. The first method, described in proposed § 1006.42(c)(2)(i), would be to place the disclosure in the body of an email. The second method, described in proposed § 1006.42(c)(2)(ii), would be to place the disclosure on a secure website that is accessible by clicking on a hyperlink included within an electronic communication, provided certain other conditions are met.

42(c)(2)(i)

Proposed § 1006.42(c)(2)(i) would allow a debt collector to place the disclosure in the body of an email sent to an email address described in § 1006.42(c)(1). Proposed comment 42(c)(2)(i)–1 would clarify that a debt collector places a disclosure in the body of an email if the disclosure's content is viewable within the email itself. Some pre-proposal feedback suggested that creditors rarely provide required disclosures within the body of an email if those disclosures include transaction-specific information. This may be because email has not traditionally been viewed as a secure form of communication. It may also be because creditors prefer to provide required disclosures in a PDF or similar format. On the other hand, many creditors now send email alerts to consumers, and these alerts often include transaction-specific information. In addition, the use of technology that protects

[574] 15 U.S.C. 7004(d)(1).

[575] As discussed in part VI, the Bureau estimates that it costs between $0.50 and $0.80 to send a validation notice by postal mail, whereas the marginal cost of sending a validation notice electronically is approximately zero.

consumer privacy by encrypting emails while in transit appears to be increasing.[576] For these reasons, providing a disclosure in the body of an email may pose no more risk of third-party interception than delivery by mail.[577]

The Bureau requests comment on proposed § 1006.42(c)(2)(i) and on proposed comment 42(c)(2)(i)–1, including on the risks and benefits of allowing a debt collector to place a required disclosure in the body of an email without first providing the consumer with notice and an opportunity to opt out. In addition, the Bureau requests comment on whether creditors or debt collectors currently provide required disclosures bearing transaction-specific information in the body of emails and, if not, the reasons why not. The Bureau also requests comment on the prevalence of ''in-transit'' encryption technology and whether that technology has reduced any concerns about the security of emails. The Bureau also requests comment on the prevalence of technology that would allow a consumer to save or print a text message.

42(c)(2)(ii)

Proposed § 1006.42(c)(2)(ii) provides that, in lieu of placing a disclosure in the body of an email, a debt collector who is delivering a required disclosure electronically pursuant to the alternative procedures may place the disclosure on a secure website that is accessible by clicking on a clear and conspicuous hyperlink included within an electronic communication sent to an email address or a telephone number described in § 1006.42(c)(1). However, this method would be available only if three additional conditions, described in proposed § 1006.42(c)(2)(ii)(A) through (C), are satisfied.

First, proposed § 1006.42(c)(2)(ii)(A) would require that the disclosure be accessible on the website for a reasonable period of time and be capable of being saved or printed. The Bureau proposes these requirements because a disclosure that is only briefly accessible, like a disclosure that cannot be saved or printed, may be unlikely to provide notice in a form the consumer can keep and access later.

Second, proposed § 1006.42(c)(2)(ii)(B) would require that the consumer receive notice and an opportunity to opt out of hyperlinked delivery as described in proposed § 1006.42(d). Placing a required disclosure on a secure website and sending the consumer an electronic communication containing a hyperlink may be more convenient for some debt collectors than including the required disclosure in the body of an email. However, because debt collectors and consumers typically lack a pre-existing relationship, delivering a required disclosure by hyperlink without first alerting the consumer by separate means may not be reasonably expected to provide actual notice. Federal agencies have advised consumers against clicking on hyperlinks provided by unfamiliar senders.[578] According to recent reports, some scams have used fake debt collection emails to lure consumers into clicking on hyperlinks.[579] To address these risks, some consumer email services can be configured to block hyperlinks from unrecognized senders.[580] Consumers may be likely to follow safe browsing habits and not click on a hyperlink in an initial communication from an unfamiliar debt collector.[581] Therefore, it may be unreasonable for a debt collector to expect that a consumer has actual notice of an electronic disclosure delivered by hyperlink if the consumer does not expect to receive a hyperlinked disclosure from that particular debt collector. Proposed § 1006.42(d), discussed below, describes consumer notice-and-opt-out processes meant to ensure that, before a debt collector sends a required disclosure by hyperlink, the consumer expects to receive it and does not object to such receipt. By helping the consumer identify the sender in advance, a notice-and-opt-out process may also reduce the risk that the consumer will treat an email containing a hyperlink as spam.

Third, proposed § 1006.42(c)(2)(ii)(C) would require that the consumer not have opted out during the opt-out period. The Bureau proposes this requirement because a debt collector may not reasonably expect that a consumer has actual notice of a hyperlinked disclosure if the consumer has opted out of receiving disclosures in that manner.

The Bureau requests comment on proposed § 1006.42(c)(2)(ii), including on the risks and benefits of allowing a debt collector to place a required disclosure on a secure website accessible by hyperlink, particularly compared to placing a required disclosure in the body of an email. The Bureau also requests comment on whether to clarify further what it means for a hyperlink to be clear and conspicuous and, if so, what factors may be relevant to determining whether a hyperlink is clear and conspicuous. In addition, the Bureau requests comment on whether to clarify further what it means for a disclosure to remain available on a website for a reasonable time and, if so, the length of time that should qualify as reasonable. In addition, the Bureau requests comment on the prevalence of anti-virus software and other technologies that identify whether a hyperlink included in an email or text message is safe, and whether consumers using such technologies are likely click on hyperlinks from unrecognized debt collectors. The Bureau also requests comment on whether debt collectors who wish to provide required disclosures electronically would be more likely to do so in the body of an email under proposed § 1006.42(c)(2)(i) or on a secure website that is accessible by clicking on a hyperlinked included within an electronic communication under proposed § 1006.42(c)(2)(ii), and the reasons why.

42(d) Notice and Opportunity To Opt Out of Hyperlinked Delivery

Proposed § 1006.42(d) describes two processes for providing consumers with notice and an opportunity to opt out of

[576] For example, at least one major email provider reports that a growing number of email providers encrypt messages sent to and from their services using Transport Layer Security encryption, and that use of ''in transit'' encryption continues to increase. *See* Google, *Email Encryption in Transit,* Google Transparency Rep., *https://transparencyreport.google.com/safer-email/overview* (last visited May 6, 2019).

[577] In pre-proposal feedback, several industry stakeholders and a small entity representative who participated in the SBREFA process requested that the Bureau clarify how to deliver required disclosures by text message. As described in the section-by-section analysis of proposed § 1006.42(c)(2)(ii), the Bureau's proposal would, subject to certain conditions, permit a debt collector to use a text message to deliver a hyperlink to a disclosure placed on a secure website.

[578] For example, the FTC advises consumers not to open links or attachments to emails they do not recognize, in order to prevent phishing and malware. *See* Fed. Trade Comm'n, *Phishing* (July 2017), *https://www.consumer.ftc.gov/articles/0003-phishing;* Fed. Trade Comm'n, *Malware* (Nov. 2015), *https://www.consumer.ftc.gov/articles/0011-malware.* The FDIC offers consumers similar guidance. *See* Fed. Deposit Ins. Comm'n, *Beware of Malware: Think Before You Click, https://www.fdic.gov/consumers/consumer/news/cnwin16/malware.html* (last updated Mar. 8, 2016).

[579] *See, e.g.,* Claer Barrett, *Beware Fake Debt Collection Emails, Says Action Fraud,* Fin. Times, Apr. 8, 2016, *https://www.ft.com/content/43fdbb30-fce4-11e5-b3f6-11d5706b613b.*

[580] *See* Microsoft Off. Support, *Help Keep Spam and Junk Email Out of Your Inbox in Outlook.com,* Microsoft, *https://support.office.com/en-us/article/help-keep-spam-and-junk-email-out-of-your-inbox-in-outlook-com-a3ece97b-82f8-4a5e-9ac3-e92fa6427ae4* (last visited May 6, 2019).

[581] In comments to the Bureau's ANPRM, a large debt collector agreed that consumers may view disclosures from unknown collectors with suspicion, such as when the consumer has not received advance information about the debt collector from a creditor.

hyperlinked delivery of required disclosures, as required by proposed § 1006.42(c)(2)(ii)(B). A debt collector who wishes to place a required disclosure on a website that is accessible by clicking on a hyperlink included within an electronic communication would be required to choose between these notice-and-opt-out processes. One process, described in proposed § 1006.42(d)(1), would involve a communication between the debt collector and the consumer before the required disclosure is provided; the other process, described in proposed § 1006.42(d)(2), would involve a communication between the creditor and the consumer before the required disclosure is provided.

Proposed comment 42(d)–1 would clarify that a debt collector's or a creditor's communication with a consumer pursuant to § 1006.42(d)(1) or (2), respectively, applies to all disclosures covered by § 1006.42(a) that the debt collector thereafter sends regarding that debt, unless the consumer later designates that email address or, in the case of text messages, that telephone number as unavailable for the debt collector's use, such as by opting out pursuant to the instructions required by § 1006.6(e). The Bureau proposes § 1006.42(d) for the same reasons and pursuant to the same authority discussed in the section-by-section analysis of proposed § 1006.42(c).

42(d)(1) Communication by the Debt Collector

Under proposed § 1006.42(d)(1), a debt collector must inform the consumer, in a communication with the consumer before providing the required disclosure, of the information in proposed § 1006.42(d)(1)(i) through (vi). Proposed § 1006.42(d)(1)(i) and (ii) would require the debt collector to inform the consumer of the name of the consumer who owes or allegedly owes the debt, and the name of the creditor to whom the debt currently is owed or allegedly owed. The Bureau proposes to require this information to help the consumer identify whether the debt belongs to the consumer. Proposed § 1006.42(d)(1)(iii) and (iv) would require the debt collector to inform the consumer of the email address or telephone number from which and to which the debt collector intends to send the electronic communication containing the hyperlink. The Bureau proposes to require this information to help the consumer ensure that an electronic communication containing the hyperlink is directed to an appropriate email address or telephone number, and to help the consumer identify any such electronic communication once the communication reaches the consumer's inbox. Finally, proposed § 1006.42(d)(1)(v) and (vi) would require the debt collector to inform the consumer of the consumer's ability to opt out of hyperlinked delivery of disclosures and to provide instructions for doing so within a reasonable period of time. The Bureau proposes to require this information to enable the consumer to choose whether to opt out of hyperlinked electronic disclosures from the debt collector—a choice the consumer would not have had the opportunity to make when providing E-SIGN Act consent originally to the creditor because the consumer likely would not have known the identity of any future debt collector.[582]

Proposed comment 42(d)(1)–1 would clarify that, for purposes of a debt collector's communication with the consumer under § 1006.42(d)(1), the term ''name of the consumer'' has the same meaning as the term ''consumer's name'' under § 1006.34(c)(2)(ii). The comment also includes a cross-reference to proposed comment 34(c)(2)(ii)–1, which explains that the consumer's name is what the debt collector reasonably determines is the most complete version of the name about which the debt collector has knowledge, whether obtained from the creditor or another source. Proposed comment 42(d)(1)–2 would clarify that, if a debt collector's communication with the consumer under § 1006.42(d)(1) applies to multiple debts, § 1006.42(d)(1)(i) and (ii) require the debt collector to identify the consumer and the creditor for each debt to which the communication applies.[583]

Proposed comment 42(d)(1)–3 would clarify how the requirement to communicate with the consumer before providing a hyperlinked disclosure works together with the requirement to provide the consumer a reasonable period within which to opt out. The comment explains that, in an oral communication with the consumer, such as a telephone or in-person conversation, the debt collector may require the consumer to make an opt-out decision during that same communication; however, a written or electronic communication that requires the consumer to make an opt-out decision within a period of five or fewer days does not satisfy proposed § 1006.42(d)(1). The Bureau proposes to require a debt collector to allow a consumer more than five days to make an opt-out decision in order to grant sufficient time for the consumer to see and respond to an opt-out notice provided in a written or electronic communication. Because no more than five days may elapse between an initial debt collection communication and the time the debt collector sends the validation notice under FDCPA section 809(a) as implemented by proposed § 1006.34(a)(1)(i)(B), a debt collector who wishes to obtain consumer consent to hyperlinked delivery in an initial communication must do so orally.[584] Proposed comment 42(d)(1)–4 would clarify that an opt-out notice provided by a debt collector under § 1006.42(d)(1) may be combined with an opt-out notice provided by the debt collector under § 1006.6(d)(3)(i)(B)(*1*).

The Bureau requests comment on proposed § 1006.42(d)(1) and its related commentary. In particular, the Bureau requests comment on whether, to limit the risk of third-party disclosure of the opt-out notice and to increase the likelihood that a consumer will receive actual notice of a required disclosure delivered by hyperlink, the rule should restrict the email addresses or telephone numbers to which a debt collector may send the opt-out notice that would be required by proposed § 1006.42(d)(1), such as by requiring that the opt-out notice be sent to an email address or telephone number other than the one to which the debt collector intends to send the hyperlink. The Bureau also requests comment on whether the information required to be provided under proposed § 1006.42(d)(1)(i) through (vi) is sufficient to allow a consumer to make an informed decision whether to opt out of receiving hyperlinked delivery of required disclosures. The Bureau also requests comment on whether to clarify further what it means to provide a reasonable opt-out period and, if so, how long an opt-out period should be to qualify as reasonable. In particular, the

[582] As discussed in the section-by-section analysis of proposed § 1006.42(c)(2)(ii), the rule would not permit a debt collector to deliver required disclosures by hyperlink to a consumer who opted out of such delivery.

[583] As discussed in the section-by-section analysis of proposed § 1006.42(c)(1), proposed comment 42(c)(1)–1 would clarify that, if a consumer has opted out of communications by the debt collector to an email address or, in the case of text messages, a telephone number, then that email address or telephone number cannot be used to deliver disclosures under § 1006.42(c).

[584] Under proposed § 1006.6(e), the communication containing the hyperlink would need to include a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. A consumer who no longer wished to receive hyperlinked delivery of required disclosures could revoke consent by following the opt-out instructions.

Bureau requests comment on whether the requirement to allow a consumer more than five days to make an opt-out decision in response to an opt-out notice delivered electronically, as described in proposed comment 42(d)(1)–3, should be imposed or should be shortened or lengthened. In addition, the Bureau requests comment on how a debt collector could obtain a consumer's oral consent to hyperlinked delivery of required disclosures.

42(d)(2) Communication by the Creditor

Instead of complying with the notice-and-opt-out process described in proposed § 1006.42(d)(1), which would rely on a communication between the debt collector and the consumer, a debt collector could choose to comply with the notice-and-opt-out process described in proposed § 1006.42(d)(2). The notice-and-opt-out process described in proposed § 1006.42(d)(2) would rely on a communication between the creditor and the consumer.

Under proposed § 1006.42(d)(2), a debt collector must, no more than 30 days before the debt collector's electronic communication containing the hyperlink to the disclosure, confirm that the creditor: (1) Communicated with the consumer using the email address or, in the case of a text message, the telephone number to which the debt collector intends to send the electronic communication, and (2) informed the consumer of the information in proposed § 1006.42(d)(2)(i) through (iv). The Bureau proposes to require the creditor to have communicated using the same email address or telephone number to which the debt collector intends to send the electronic communication containing the hyperlink to help ensure that the email address or telephone number is a valid one. The Bureau proposes the 30-day timing requirement to ensure that the creditor's communication with the consumer occurs shortly before the debt collector's delivery of the electronic communication containing the hyperlink to the consumer.

Proposed § 1006.42(d)(2)(i) and (ii) provide that the creditor must have informed the consumer of the placement or sale of the debt to the debt collector, and of the name the debt collector uses when collecting debts. The Bureau proposes to require this information to help the consumer identify the debt collector and the debt collector's relationship to the creditor and the account. Proposed § 1006.42(d)(2)(iii) provides that the creditor must have informed the consumer of the debt collector's option to use the consumer's email address or, in the case of a text message, the consumer's telephone number to provide any legally required debt collection disclosures in a manner that is consistent with Federal law. The Bureau proposes to require this information to help the consumer expect and recognize an electronic communication from the debt collector containing a hyperlink to a disclosure.

Proposed § 1006.42(d)(2)(iv) provides that the creditor must have informed the consumer of the information described in § 1006.42(d)(1)(iii), (v), and (vi). The Bureau proposes to require this information for the reasons discussed in the section-by-section analysis of proposed § 1006.42(d)(1).[585] Proposed comment 42(d)(2)–1 would clarify that a creditor's communication with the consumer under § 1006.42(d)(2) may apply to multiple debts being placed with or sold to the same debt collector at the same time. Proposed comment 42(d)(2)–2 would clarify how the requirement to communicate with the consumer before providing a hyperlinked disclosure works together with the requirement to provide the consumer a reasonable period within which to opt out. The comment explains that, in an oral communication with the consumer, such as a telephone or in-person conversation, the creditor may require the consumer to make an opt-out decision during that same communication; however, a written or electronic communication that requires the consumer to make an opt-out decision within a period of five or fewer days does not satisfy proposed § 1006.42(d)(2). The Bureau proposes to require a creditor to allow a consumer more than five days to make an opt-out decision in order to grant sufficient time for the consumer to see and respond to an opt-out notice provided in a written or electronic communication. Proposed comment 42(d)(2)–3 would clarify that an opt-out notice provided by a creditor under § 1006.42(d)(2) may be combined with an opt-out notice provided by the creditor under § 1006.6(d)(3)(i)(B)(*1*).

The Bureau requests comment on proposed § 1006.42(d)(2) and on proposed comment 42(d)(2)–1. In particular, the Bureau requests comment on whether the 30-day timing requirement should be lengthened or shortened. In addition, the Bureau requests comment on whether the information that proposed § 1006.42(d)(2)(i) through (iv) would require is sufficient to allow a consumer to make an informed decision whether to opt out of receiving hyperlinked delivery of required disclosures. The Bureau also requests comment on how often creditors communicate with consumers regarding the placement or sale of a debt. The Bureau also requests comment on whether debt collectors who wish to provide required disclosures electronically pursuant to proposed § 1006.42(c)(2)(ii) would be more likely to choose the notice-and-opt-out process described in proposed § 1006.42(d)(1) (communication by the debt collector) or the notice-and-opt-out process described in proposed § 1006.42(d)(2) (communication by the creditor), and the reasons why.

42(e) Safe Harbors

Proposed § 1006.42(e) would establish two safe harbors, the first covering provision of disclosures by mail and the second covering provision of the validation notice within the body of an email that is a debt collector's initial communication with the consumer. Conduct that falls within these safe harbors would satisfy proposed § 1006.42(a)(1)'s notice and retainability requirements.

The Bureau proposes § 1006.42(e) to implement and interpret FDCPA sections 809(a) and (b) and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. Under FDCPA section 809(a), a debt collector must include certain information in the debt collector's initial communication with the consumer or ''send the consumer'' a ''written'' notice (*i.e.,* the validation notice) containing that information. Under FDCPA section 809(b), a debt collector must ''mail[ ] to the consumer'' any original-creditor or verification information it provides. As discussed in the section-by-section analysis of proposed § 1006.42(a)(1), a form of delivery that is not reasonably expected to provide actual notice may not satisfy FDCPA section 809(a)'s requirement to ''send the consumer'' a notice or FDCPA section 809(b)'s requirement to ''mail[ ]'' original-creditor and verification information to the consumer. In addition, a written or electronic notice that is not retainable may not satisfy FDCPA section 809's writing requirement. Conversely, a debt collector may reasonably expect that conduct falling within the safe harbors described in proposed § 1006.42(e) will provide actual notice to the consumer in a retainable form.

[585] The process described in proposed § 1006.42(d)(2) for ensuring that consumers reasonably expect delivery of hyperlinked disclosures may generally align with some existing industry practices. For example, some creditors may already notify consumers when a debt is placed for collection or sold to a third party. The communications described in proposed § 1006.42(d)(2) could be included in such notices.

42(e)(1) Disclosures Provided by Mail

Proposed § 1006.42(e)(1) would establish a safe harbor for delivery of disclosures by mail. Specifically, proposed § 1006.42(e)(1) provides that a debt collector satisfies § 1006.42(a)(1) if the debt collector mails a printed copy of a required disclosure to the consumer's residential address, unless the debt collector receives notification from the entity or person responsible for delivery that the disclosure was not delivered.

Although proposed § 1006.42(e)(1) mentions the consumer's residential address, mailing a printed disclosure to another address, such as a consumer's post office box, may be reasonably expected to provide actual notice in certain circumstances. The Bureau understands, however, that most debt collectors send paper validation notices to residential addresses and that, in general, it is reasonable to expect that sending a validation notice to a consumer's residential address will provide actual notice. Accordingly, the safe harbor in proposed § 1006.42(e)(1) only covers validation notices sent to residential addresses. The safe harbor in proposed § 1006.42(e)(1) also would not apply if a debt collector receives notification that the disclosure was not delivered. This aspect of proposed § 1006.42(e)(1) is consistent with case law holding that a written notice returned as undeliverable has not actually been sent to the consumer within the meaning of the FDCPA.[586]

Proposed comment 42(e)(1)–1 would clarify that, for purposes of § 1006.42(e)(1), a disclosure is not mailed to a consumer's residential address if the debt collector knows or should know at the time of mailing that the consumer does not currently reside at that location. The Bureau proposes this comment because, in such a circumstance, the debt collector likely lacks a reasonable expectation of actual notice. The Bureau requests comment on proposed § 1006.42(e)(1) and on proposed comment 42(e)(1)–1.

42(e)(2) Validation Notice Contained in the Initial Communication

In pre-proposal feedback, industry stakeholders asked the Bureau to clarify how to deliver the validation notice electronically in a debt collector's initial communication with the consumer. Proposed § 1006.42(e)(2) would provide a safe harbor to debt collectors who deliver a validation notice in the body of an email that is the debt collector's initial communication with the consumer, provided certain other conditions are satisfied.

The E-SIGN Act's consumer consent provisions apply if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing.[587] As discussed in the section-by-section analysis of proposed § 1006.34(a)(1), neither FDCPA section 809(a) nor proposed Regulation F prohibit a debt collector from providing the validation information described in proposed § 1006.34(c) orally or electronically in the debt collector's initial communication with the consumer. Accordingly, the E-SIGN Act's consumer consent provisions do not apply to the extent a debt collector provides the validation information in the body of an email that is the debt collector's initial communication with the consumer.[588] However, proposed § 1006.42(a)(1) would apply.[589] Thus, a debt collector who provides the validation notice in the body of an email that is the debt collector's initial communication with the consumer would need to do so in a manner reasonably expected to provide actual notice and in a form that the consumer may keep and access later.

The processes described in proposed § 1006.42(b) may be reasonably expected to provide actual notice in a form that the consumer may keep and access later. Accordingly, a debt collector who provides the validation notice in the body of an email that is the debt collector's initial communication with the consumer would satisfy § 1006.42(a)(1) by complying with § 1006.42(b). Proposed § 1006.42(b)(1) would, except as provided in § 1006.42(c), require a debt collector to provide the disclosure in accordance with the E-SIGN Act after the consumer provides affirmative consent directly to the debt collector. Proposed § 1006.42(c)(1), which describes one element of the alternative procedures, would require a debt collector to provide the disclosure by sending an electronic communication to an email address or, in the case of a text message, a telephone number that the creditor or a prior debt collector could have used to provide electronic disclosures in accordance with section 101(c) of the E-SIGN Act.

When it comes to providing the validation notice in the body of an email that is the initial communication with the consumer, however, it may be appropriate to expand the email addresses to which a debt collector may send the disclosure. In particular, because the E-SIGN Act does not apply to this form of delivery in the first place, it may not be necessary to limit the safe harbor to those email addresses for which a consumer has already provided E-SIGN Act consent to the creditor or a prior debt collector. Proposed § 1006.6(d)(3) identifies procedures for identifying email addresses to which debt collection communications can be sent. As described in the section-by-section analysis of proposed § 1006.6(d)(3), these proposed procedures are designed to ensure that a debt collector who uses a particular email address or telephone number selected through the procedures does not have a reason to anticipate that an unauthorized third-party disclosure may occur. One point of the procedures is to identify an email address or telephone number that the consumer who owes or allegedly owes the debt uses. Thus, if a debt collector includes the validation notice in the body of an email that is its initial communication with the consumer, sending the email to an email address selected through the procedures described in proposed § 1006.6(d)(3) may be reasonably likely to provide actual notice to the consumer.

For these reasons, proposed § 1006.42(e)(2) provides that a debt collector who provides the validation notice described in § 1006.34(a)(1)(i)(A) within the body of an email that is the initial communication with the consumer satisfies § 1006.42(a)(1) if the debt collector satisfies the requirements of § 1006.42(b) for validation notices described in § 1006.34(a)(1)(i)(B).[590] If

[586] *See, e.g., Johnson* v. *CFS II, Inc.,* No. 12–CV–01091, 2013 WL 1809081, at *10 (N.D. Cal. Apr. 28, 2013) (''[I]f a debtor rebuts the presumption of proper delivery by showing that notice was sent to an incorrect address or returned as undeliverable, the language and purpose of the FDCPA require further action by a debt collector.''); *Johnson* v. *Midland Credit Mgmt. Inc.,* No. 1:05 CV 1094, 2006 WL 2473004, at *12 (N.D. Ohio Aug. 24, 2006) (''[W]hile the plain language of the statute does not require the debt collector to ensure actual receipt of the validation notice, the plain language does require the debt collector to send the validation notice to a valid and proper address where the consumer may actually receive it. If the debt collector knows the validation notice was sent to the wrong address, the debt collector has not complied with the plain language of the statute.'').

[587] 15 U.S.C. 7001(c).

[588] Conversely, the E-SIGN Act's consumer consent provisions do apply to the extent a debt collector provides the validation information outside of the initial communication because, under FDCPA section 809(a), that information must be in writing if not contained in the initial communication.

[589] This is because proposed § 1006.42(a)(1) would apply if a debt collector provides in writing or electronically a disclosure that is required by Regulation F.

[590] This means that, among other things, for a debt collector's conduct to fall within the safe harbor that proposed § 1006.42(e)(2) would create,

such a debt collector follows the procedures described in proposed § 1006.42(c), the debt collector may, in lieu of sending the validation notice to an email address that the creditor or a prior debt collector could use for delivery of electronic disclosures in accordance with section 101(c) of the E-SIGN Act (as described in § 1006.42(c)(1)), send the validation notice to an email address selected through the procedures described in proposed § 1006.6(d)(3).

Proposed § 1006.42(e)(2) would create a safe harbor. It would not establish the only way a debt collector may deliver the validation notice in the body of an email that is the debt collector's initial communication with the consumer. Nor would it provide a safe harbor for a debt collector delivering the validation notice as a hyperlink in an email or text message that is the debt collector's initial communication with the consumer. Indeed, for the reasons discussed in the section-by-section analysis of proposed § 1006.42(c)(2)(ii), it may be unreasonable for a debt collector to expect that a consumer has actual notice of a validation notice delivered by hyperlink—no matter the email address or telephone number to which the electronic communication containing the hyperlink is sent—if the consumer does not expect to receive a hyperlinked disclosure from that particular debt collector. Proposed comment 42(e)(2)–1 would clarify that, if a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following the instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to deliver disclosures under § 1006.42(e)(2).

The Bureau requests comment on proposed § 1006.42(e)(2) and on proposed comment 42(e)(2)–1. In particular, the Bureau requests comment on whether using an email address selected through the procedures described in proposed § 1006.6(d)(3) is reasonably likely to provide actual notice to the consumer. The Bureau also requests comment on whether a debt collector who wishes to provide the validation notice in the body of an email that is the debt collector's initial communication with the consumer is more likely to send the validation notice to an email address described in proposed § 1006.42(c)(1) or to an email address selected through the procedures described in proposed § 1006.6(d)(3). In addition, the Bureau requests comment on whether a debt collector who wishes to provide a validation notice in the debt collector's initial communication with the consumer is likely to use the safe harbor in proposed § 1006.42(d)(2) and, if not, the reasons why not.

Subpart C—Reserved

Subpart D—Miscellaneous

Section 1006.100 Record Retention

Proposed § 1006.100 would require a debt collector to retain evidence of compliance with Regulation F. The purpose of a record retention requirement would be to promote effective and efficient enforcement and supervision of Regulation F. Any retention period therefore must be long enough to ensure access to evidence that the debt collector performed the actions and made the disclosures required by the regulation. For ease of compliance, any retention period also should have easily determinable beginning and end dates.

For these reasons, the Bureau proposes § 1006.100 to require a debt collector to retain evidence of compliance with Regulation F starting on the date that the debt collector begins collection activity on a debt and ending three years after: (1) The debt collector's last communication or attempted communication in connection with the collection of the debt; or (2) the debt is settled, discharged, or transferred to the debt owner or to another debt collector. Requiring debt collectors to begin retaining evidence of compliance when collection activity begins should provide an easily determinable start date.

In the Small Business Review Panel Outline, the Bureau described a proposal to determine the end of the retention obligation from a debt collector's last communication or attempted communication with the consumer about a debt. Proposed § 1006.100 is not limited to communications or attempted communications with a consumer; a communication with any person may serve as the end date from which the retention period may be calculated. Proposed § 1006.100 also adds that the end of the retention period may be calculated from the time a debt is settled, discharged, or transferred to the debt owner or to another debt collector. This addition is intended to provide debt collectors with a more easily ascertainable date from which to measure their retention obligations, if such a date exists. The proposed three-year retention period should promote effective and efficient enforcement and supervision of Regulation F while not unduly burdening debt collectors; during the SBREFA process, nearly all small entity representatives stated that they already retain many records for at least three years.

Proposed comment 100–1 would clarify that, under proposed § 1006.100, a debt collector must retain evidence that the debt collector performed the actions and made the disclosures required by Regulation F. Proposed comment 100–1 also provides examples of the evidence that a debt collector could retain to show that the debt collector complied with certain sections of the regulation. Proposed comment 100–2 would clarify that proposed § 1006.100 would not require debt collectors to retain paper copies of documents, provided the records are retained by a method that reproduces the records accurately. Proposed comment 100–3 would clarify that proposed § 1006.100 would not require debt collectors to record telephone calls, but that a debt collector who records such calls must retain the recordings if they are evidence of compliance with Regulation F.

The Bureau requests comment on proposed § 1006.100 and on whether any additional clarification is needed. In particular, the Bureau requests comment on the length of the retention period, the date from which the retention obligation should be measured, and the types of records that should be maintained. The Bureau also requests comment on the burden proposed § 1006.100 would impose on debt collectors who may engage in initial attempts to collect a debt and then transition to monitoring the account without engaging in any collection communications but with the intent or option of restarting collection at a later date. The Bureau also requests comment on whether there are scenarios in which it is not possible to determine the last communication or attempted communication, such as when a person contacts the debt collector without outreach from the debt collector. The Bureau further requests comment on the merits of narrowing this prong to the debt collector's last communication or attempted communication with the consumer in connection with the collection of the debt, instead of the debt collector's last communication or attempted communication with any person. The Bureau requests comment on whether the two alternative proposed end dates of the retention period provide sufficient clarity on calculating the retention period.

During the SBREFA process, some small entity representatives stated that

a debt collector would need to comply with the requirement proposed in § 1006.42(b)(4) to provide the validation notice in a responsive form.

they retain some information, such as telephone calls or notes, for less than three years, and they expressed concern about the potential cost of storing additional data. The Small Business Review Panel recommended that the Bureau seek more information to estimate the costs of record retention and request comment about whether the retention of some records, such as telephone calls, poses particularly high costs for any debt collectors. The Bureau requests comment on these topics, on debt collectors' current record retention practices, and on the benefits to consumers of a record retention requirement that applies to all FDCPA-covered debt collectors.

The Bureau proposes § 1006.100 pursuant to its authority under Dodd-Frank Act section 1022(b)(1), which, among other things, provides that the Bureau's director may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof. The Bureau also proposes § 1006.100 pursuant to Dodd-Frank Act section 1024(b)(7)(A), which authorizes the Bureau to prescribe rules to facilitate supervision of persons identified as larger participants of a market for a consumer financial product or service as defined by rule in accordance with section 1024(a)(1)(B) of the Dodd-Frank Act;[591] and Dodd-Frank Act section 1024(b)(7)(B), which authorizes the Bureau to require a person described in Dodd-Frank Act section 1024(a)(1) to retain records for the purpose of facilitating supervision of such persons and assessing and detecting risks to consumers. For the reasons described above, the Bureau proposes § 1006.100 to facilitate supervision of, and to assess and detect risks to consumers posed by, debt collectors that are larger participants of the consumer debt collection market, as defined by rule, and to enable the Bureau to conduct enforcement investigations to identify and help prevent and deter the abusive, unfair, and deceptive debt collection practices identified in the regulation.

Section 1006.104 Relation to State Laws

FDCPA section 816 provides that the Act does not annul, alter, or affect, or exempt any person subject to the provisions of the Act from complying with the laws of any State[592] with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the Act, and then only to the extent of the inconsistency. FDCPA section 816 also provides that, for purposes of that section, a State law is not inconsistent with the Act if the protection such law affords any consumer is greater than the protection provided by the Act.[593]

The Bureau proposes § 1006.104 to implement FDCPA section 816 and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors. Proposed § 1006.104 mirrors the statute, except that proposed § 1006.104 refers to both the provisions of the Act and the corresponding provisions of Regulation F.

As discussed in the section-by-section analysis of proposed § 1006.34, some States and localities impose their own disclosure requirements on debt collectors. During the SBREFA process, several small entity representatives expressed concern about possible overlap or inconsistencies between State and local disclosure requirements and the Bureau's proposed disclosure requirements. In its report, the Small Business Review Panel recommended that the Bureau continue to consider State law disclosures, particularly to determine whether there are any specific burdens or costs caused by overlap or conflict between the Bureau's disclosures and State disclosures. The Panel also recommended that the Bureau continue to consider whether clarifications may be necessary in the event that Federal disclosures overlap with State law requirements.[594] Consistent with the Small Business Review Panel's recommendations, proposed comment 104–1 would clarify that a disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the Act or the corresponding provisions of the regulation.[595]

The Bureau requests comment on proposed § 1006.104 and proposed comment 104–1, including on whether any additional clarification is needed. In particular, consistent with the Small Business Review Panel's recommendation, the Bureau requests comment on whether disclosures required by specific State or local laws are inconsistent with the Bureau's proposed disclosures, and any specific burdens or costs caused by such overlap or conflict.

Section 1006.108 Exemption for State Regulation and Appendix A Procedures for State Application for Exemption From the Provisions of the Act

FDCPA section 817 provides that the Bureau shall by regulation exempt from the requirements of the Act any class of debt collection practices within any State if the Bureau determines that, under the law of that State, that class of debt collection practices is subject to requirements substantially similar to those imposed by the Act, and that there is adequate provision for enforcement.[596] Sections 1006.1 through 1006.8 of current Regulation F implement FDCPA section 817 and set forth procedures and criteria whereby States may apply to the Bureau for exemption of debt collection practices within the applying State from the provisions of the Act.[597] The Bureau proposes to retain these procedures and criteria, reorganized as § 1006.108 and appendix A and with the minor changes for clarity described below, to implement and interpret FDCPA section 817 and pursuant to its authority under FDCPA section 814(d) to prescribe rules with respect to the collection of debts by debt collectors.

Consistent with existing § 1006.2, proposed § 1006.108(a) provides that any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to, or provide greater protection for consumers than, those imposed under FDCPA sections 803 through 812, and that there is adequate provision for State enforcement of such requirements. Proposed § 1006.108(a) would clarify that, to be eligible for an exemption, the class of debt collection practices within that State also would need to be subject to requirements that are substantially similar to, or provide greater protection for consumers than, the provisions of Regulation F corresponding to FDCPA sections 803 through 812.

Proposed § 1006.108(b) provides that the procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection

[591] 12 CFR 1090.105 defines larger participants of the consumer debt collection market.

[592] Proposed § 1006.2(*l*) would define State to mean ''any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.''

[593] 15 U.S.C. 1692n.

[594] Small Business Review Panel Report, *supra* note 57, at 34.

[595] In response to the Small Business Review Panel's recommendations on this issue, proposed § 1006.34(d)(3)(iv) permits a debt collector to include State law disclosures on the reverse of the validation notice.

[596] 15 U.S.C. 1692o.

[597] 12 CFR part 1006.

practices within the applying State from the provisions of the Act and the corresponding provisions of Regulation F are set forth in appendix A to the regulation. Proposed appendix A, in turn, sets forth the procedures and criteria whereby States may apply to the Bureau for the exemption described in proposed § 1006.108. Proposed appendix A largely mirrors existing §§ 1006.1 through 1006.8, with certain organizational changes and other, minor changes for clarity and to more closely track the statute. The Bureau also proposes to amend the current notice system for acting on State requests for exemption to a proposed and final rule system.

As with proposed § 1006.108(a), proposed appendix A would clarify that, to be eligible for an exemption, the class of debt collection practices within the applying State also would need to be subject to requirements that are substantially similar to, or provide greater protection for consumers than, the provisions of Regulation F corresponding to FDCPA sections 803 through 812. The Bureau also proposes to revise certain phrases in existing §§ 1006.1 through 1006.8 to ensure uniform terminology throughout appendix A. For example, proposed appendix A would use the phrase ''more protective of consumers than'' State law throughout, rather than variations such as ''more extensive than'' and ''more favorable than'' State law, which appear in certain places in existing §§ 1006.3 and 1006.4.

Proposed appendix A would include several additional changes to existing Regulation F.

First, to streamline appendix A, the Bureau proposes to include two new definitions in proposed paragraph I(b). The first, in proposed paragraph I(b)(1), would define ''applicant State law'' to mean the State law that, for a class of debt collection practices within that State, is claimed to contain requirements that are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that contains adequate provision for State enforcement. The second, in proposed paragraph I(b)(3), would define ''relevant Federal law'' to mean sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of Regulation F. Accordingly, the proposed text of appendix A substitutes these terms throughout where appropriate.

Second, proposed appendix A would strike existing § 1006.3(c) as redundant of proposed paragraph III(a) as revised.

Third, proposed paragraph III(d) of appendix A would repeat existing § 1006.3(e) with certain clarifications. Existing § 1006.3(e) requires the applicant State to submit, among other supporting materials, information regarding the State's fiscal arrangements for administrative enforcement and the number and qualifications of enforcement personnel, along with a description of State enforcement procedures. In assessing the adequacy of State enforcement, however, existing § 1006.4(b)—which is repeated in proposed paragraph IV(b) of appendix A—requires the Bureau to consider three general categories of information: necessary facilities, personnel, and funding. Because the criteria for evaluating the adequacy of State enforcement refers to these general categories of information, the Bureau proposes that paragraph III(d) of appendix A also refer to these general categories of information. Proposed paragraph III(d) of appendix A therefore would require the applicant State to submit information concerning the adequacy of enforcement, including information about necessary facilities, personnel, and funding. Proposed paragraph III(d) of appendix A also would clarify that examples of information relating to adequacy of enforcement that an applicant State must submit include the State's fiscal arrangements for administrative State enforcement, the number and qualifications of enforcement personnel, and a description of the State's enforcement procedures.

Fourth, the Bureau proposes to clarify in proposed paragraph IV(a)(1)(i) of appendix A that the ''substantially similar'' standard in FDCPA section 817 applies to the Bureau's consideration of all aspects of the State law for which the exemption is sought, including defined terms and rules of construction. Existing § 1006.4(a)(1)(i) states that defined terms and rules of construction must be ''the same'' as the FDCPA. The Bureau interprets FDCPA section 817's substantial similarity standard also to apply to defined terms and rules of construction. That standard permits variation from FDCPA defined terms and rules of construction, as long as the State law definitions and rules of construction are substantially similar to or more protective of consumers than the FDCPA. Accordingly, proposed paragraph IV(a)(1)(iv) of appendix A uses the phrase ''substantially similar'' rather than ''the same.''

Fifth, proposed paragraph VI(b) of appendix A would repeat existing § 1006.6(b) with certain clarifications. Existing § 1006.6(b) requires a State that has obtained an exemption to submit such reports to the Bureau as the Bureau may from time to time require. The Bureau proposes to clarify that this provision requires the State to submit to the Bureau, not later than two years after the date the exemption is granted, and every two years thereafter, a written report concerning the manner in which the State has enforced its law in the preceding two years and an update of the information required under proposed paragraph III(d) of appendix A. By requiring such information to be updated every two years, proposed appendix A would ensure that the Bureau is aware of changes that may affect the State's capacity to enforce the laws that qualified the State for the exemption.

The Bureau requests comment on proposed § 1006.108 and proposed appendix A, and on whether any additional clarification is needed. The Bureau also requests comment on whether proposed § 1006.108 should be clarified or broadened to allow for an exemption from provisions of Regulation F that are not based exclusively on FDCPA sections 803 through 812. Similarly, the Bureau requests comment on whether proposed § 1006.108 should be clarified or broadened to allow for an exemption from provisions of Regulation F that are based solely on the Bureau's authority under the Dodd-Frank Act. The Bureau potentially could adopt such a process pursuant to its exemption authority under section 1022(b)(3)(A) of the Dodd-Frank Act.

Further, current Regulation F includes the phrase ''provide greater protection for consumers than,'' which is a concept incorporated from FDCPA section 816. It also provides that ''[a]fter an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part.'' The Bureau does not propose to change this language in proposed § 1006.108 or proposed appendix A, as the Bureau does not seek to make additional substantive changes to the requirements for State requests for exemption. The Bureau requests comment on the use of this language in proposed § 1006.108 and proposed appendix A.

Appendix C to Part 1006—Issuance of Advisory Opinions [598]

The Bureau proposes to add appendix C to Regulation F to publish a list of any advisory opinions that the Bureau issues pursuant to FDCPA section 813(e). Proposed appendix C would clarify that any act done or omitted in good faith in conformity with any advisory opinion issued by the Bureau, including those referenced in appendix C, provides the protection from liability for FDCPA-based violations afforded under FDCPA section 813(e). Proposed appendix C also includes instructions for requesting an advisory opinion. The Bureau requests comment on whether additional clarification regarding the effect of conformity with Bureau advisory opinions would be helpful.

Supplement I to Part 1006—Official Interpretations

The Bureau proposes to add Supplement I to Regulation F to publish official interpretations of the regulation (*i.e.,* commentary). Proposed comment I–1 explains that the commentary is the Bureau's vehicle for supplementing Regulation F and has been issued pursuant to the Bureau's authority to prescribe rules under 15 U.S.C. 1692*l*(d) and in accordance with the notice-and-comment procedures for informal rulemaking under the Administrative Procedure Act. Proposed comment I–2 sets forth the procedure for requesting that an official interpretation be added to Supplement I, and proposed comment I–3 describes how the commentary is organized and numbered. Proposed commentary relating to specific sections of the regulation are addressed in the section-by-section analyses of those sections, above. The Bureau requests comment on proposed comments I–1, –2, and –3, including on whether additional clarification regarding either the purpose or organization of Supplement I, or the procedure for requesting official interpretations, would be helpful.

VI. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing the proposed rule, the Bureau has considered the proposal's potential benefits, costs, and impacts.[599] The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts.

Debt collectors play a critical role in markets for consumer financial products and services. Credit markets function because lenders expect that borrowers will pay them back. In consumer credit markets, if borrowers fail to repay what they owe per the terms of their loan agreement, creditors often engage debt collectors to attempt to recover amounts owed, whether through the court system or through less formal demands for repayment.

In general, third-party debt collection creates the potential for market failures. Consumers do not choose their debt collectors, and as a result debt collectors do not have the same incentives that creditors have to treat consumers fairly.[600] Certain provisions of the FDCPA may help mitigate such market failures in debt collection, for example by prohibiting unfair, deceptive, or abusive debt collection practices by third-party debt collectors.

Any restriction on debt collection may reduce repayment of debts, providing a benefit to some consumers who owe debts and an offsetting cost to creditors and debt collectors. A decrease in repayment will in turn lower the expected return to lending. This can lead lenders to increase interest rates and other borrowing costs and to restrict availability of credit, particularly to higher-risk borrowers.[601] Because of this, policies that increase protections for consumers with debts in collection involve a tradeoff between the benefits of protections for such consumers and the possibility of increased costs of credit and reduced availability of credit for all consumers. Whether there is a net benefit from such protections depends on whether consumers value the protections enough to outweigh any associated increase in the cost of credit or reduction in availability of credit.

The proposal would further the FDCPA's goals of eliminating abusive debt collection practices and ensuring that debt collectors who refrain from such practices are not competitively disadvantaged.[602] However, as discussed below, it is not clear based on the information available to the Bureau at this time whether the net effect of the proposal's different provisions would be to make it more costly or less costly for debt collectors to recover unpaid amounts, and therefore not clear whether the proposal would tend to increase or decrease the supply of credit. The proposed rule would benefit both consumers and debt collectors by increasing clarity and certainty about what the FDCPA prohibits and requires. When a law is unclear, it is more likely that parties will disagree about what the law requires, that legal disputes will arise, and that litigation will be required to resolve disputes. Since 2010, consumers have filed approximately 10,000 to 12,000 lawsuits under the FDCPA each year.[603] The number of disputes settled without litigation has likely been much greater.[604] Perhaps more important than the costs of resolving legal disputes are the steps that debt collectors take to prevent legal disputes from arising in the first place. This includes direct costs of legal compliance, such as auditing and legal advice, as well as indirect costs from avoiding collection practices that might be both effective and legal but that raise potential legal risks. In some cases, debt

[598] Proposed appendix A is discussed in the section-by-section analysis of proposed § 1006.108. Proposed appendix B is discussed in the section-by-section analyses of proposed §§ 1006.26 and 1006.34.

[599] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(A)) requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact of the proposed rule on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act (12 U.S.C. 5516); and the impact on consumers in rural areas.

[600] Consumers do choose their lenders, and in principle consumer loan contracts could specify which debt collector would be used or what debt collection practices would be in the event a loan is not repaid. Some economists have identified potential market failures that prevent loan contracts from including such terms even when they could make both borrowers and lenders better off. For example, terms related to debt collection may not be salient to consumers at the time a loan is made. Alternatively, if such terms are salient, a contract that provides for more lenient collection practices may lead to adverse selection, attracting a disproportionate share of borrowers who know they are more likely to default. *See* Thomas A. Durkin et al., Consumer Credit and the American Economy 521–525 (Oxford U. Press 2014) (discussing potential sources of market failure and potential problems with some of those arguments).

[601] *See id.* (discussing theory and evidence on how restrictions on creditor remedies affect the supply of credit). Empirical evidence on the impact of State laws restricting debt collection is discussed in section G below. The provisions in this proposal could also affect consumer demand for credit, to the extent that consumers contemplate collection practices when making borrowing decisions. However, there is evidence suggesting that consumer demand for credit is generally not responsive to differences in creditor remedies. *See* James Barth et al., Benefits and Costs of Legal Restrictions on Personal Loan Markets, *Journal of Law & Economics,* 29(2) (1986).

[601] *See* 15 U.S.C. 1692(e).

[602] *See id.*

[603] *See* WebRecon LLC, *WebRecon Stats for Dec 2017 & Year in Review, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review* (last visited May 6, 2019). Greater clarity about legal requirements could reduce unintentional violations and could also reduce lawsuits because, when parties can better predict the outcome of a lawsuit, they may be more likely to settle claims out of court.

[604] Some debt collectors have reported that they receive approximately 10 demand letters for each lawsuit filed. *See* Small Business Review Panel Outline, *supra* note 56, at 69 n.105.

collectors seeking to follow the law and avoid litigation have adopted practices that appear to be economically inefficient, with costs that exceed the benefits to consumers or even impose net costs on consumers.[605]

Several provisions of the proposed rule would likely change the way debt collectors communicate with consumers, and the potential impacts of these provisions are likely to interact with each other in ways that are difficult for the Bureau to predict. Most significant of these are the provisions related to frequency limits for telephone calls, limited-content messages, and electronic disclosures, although other provisions such as the proposed model validation notice might fall into this category as well. The communication provisions collectively are likely to reduce the number of telephone calls from debt collectors. Currently many, though by no means all, debt collectors communicate with consumers strictly through actual and attempted live telephone calls and postal mail, with no communication by voice message, email, text message, or other electronic media.

It is possible that the net effect of the proposed provisions would be to make debt collection more effective: Debt collectors who currently communicate by live telephone calls in excess of the proposed limits could substitute for some of the excessive call volume by leaving voice messages and sending email, and consumers could respond to this change in communication channels by engaging with such debt collectors as much as or more than they currently do by telephone. If this occurs, consumers could benefit from a reduction in calls that may annoy, abuse, or harass them, as well as from resolving their outstanding debts in a more timely fashion. At the same time, debt collectors could benefit from reduced time spent making calls and from increased revenue. There is some reason to believe this may occur—as noted below, a substantial fraction of consumers prefers to communicate by email, and consumers may well be more likely to return a voice message than to answer their telephones in response to a call from an unknown number.

Alternatively, the proposed provisions might make debt collection less effective: Debt collectors could comply with the frequency limits, reducing outbound calling, but end up not increasing contact with consumers by using voicemail and email as communication channels. This might occur if debt collectors still fear some legal risk from other channels, or if they find the new communication methods are not effective in reaching consumers. In this case, although the number of telephone calls would be reduced, it would come at the cost of making it more difficult for debt collectors to reach some consumers, reducing revenue and potentially imposing costs on both consumers and debt collectors from increased litigation to recover debts.

The effect of the proposal on debt collectors would likely lie somewhere in between these two extremes, and the Bureau believes these effects will likely vary by debt collector and type of debt. If the proposed communication provisions were adopted in a final rule, some firms would likely adopt newer communication methods due to the reduced legal risk and find less need for telephone calls, while other firms would not do so or would not experience the same effect. Still other firms might be largely unaffected by the communication-related provisions in the proposal. As discussed below, some debt collectors currently place only one or two calls per week to any consumer, and such debt collectors are unlikely to change their calling practices and may not find it cost-effective to develop the information-technology infrastructure necessary to communicate by email or text message. Relatedly, the Bureau is aware of at least one mid-sized collection firm that primarily uses email for communication currently, and such firms also will be unlikely to alter their practices, although they may benefit from reduced litigation costs.

In short, the proposed provisions related to communications would likely reduce the overall number of calls per consumer, while at the same time potentially reducing the number of calls required to reach each consumer. Although the Bureau believes it is likely that consumers would benefit directly from a reduction in calls that annoy, abuse, or harass them, the Bureau cannot predict the net effect of these provisions on debt collectors' costs and revenues or the net change in indirect costs to consumers from potential credit reporting and litigation in the event debt collectors cannot reach them.

Apart from the proposed communication provisions, other provisions of the proposal could make debt collection either more or less costly in ways that are difficult to predict. For example, the proposed validation notice requirements would provide consumers with more information than they currently receive about debts, which could reduce costs to consumers and debt collectors from disputes that arise when consumers do not recognize the debt or understand the basis for the alleged amount due. At the same time, the proposal's clearer explanation of dispute rights could make consumers more likely to dispute, which could provide benefits to consumers while increasing costs for debt collectors. Disputes are costly for debt collectors to process, so these proposed requirements could either increase or decrease debt collector and consumer costs depending on the net effect on dispute rates.

In developing the proposed rule, the Bureau has consulted, or offered to consult with, the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

B. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of key provisions of the proposed rule (proposed provisions), which include:

1. Prohibited communications with consumers.
2. Frequency limits for telephone calls and telephone conversations.
3. Limited-content messages.
4. Time-barred debt: prohibiting suits and threats of suit.
5. Communication prior to furnishing information.
6. Prohibition on the sale or transfer of certain debts.
7. Notice for validation of debts.
8. Electronic disclosures and communications.

In addition to the proposed provisions listed above, the Bureau proposes to codify several FDCPA provisions into the rule and to add certain clarifying commentary.

C. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion in this part VI.C relies on publicly available information as well as information the Bureau has obtained. To better understand consumer experiences with debt collection, the Bureau developed its 2015 Debt Collection Consumer Survey, which provides the first comprehensive and nationally representative data on consumers' experiences and preferences related to debt collection.[606] The Bureau

[605] For example, as discussed further below, many debt collectors currently avoid leaving voice messages for consumers or communicating with consumers by email because sending voice messages or emails may create legal risks.

[606] The Bureau's survey was conducted between December 2014 and March 2015. Consumers with and without debts in collection were asked to complete this survey in order to provide the Bureau

Continued

also relies on its consumer complaint data, its Consumer Credit Panel, the Credit Card Database,[607] and other sources to understand potential benefits and costs to consumers of the proposed rule.[608] To better understand potential effects of the proposed rule on industry, the Bureau has engaged in significant outreach to industry, including the Operations Survey.[609] In July 2016, the Bureau consulted with small entities as part of the SBREFA process and obtained important information on the potential impacts of proposals that the Bureau was considering at the time, many of which are included in the proposed rule.[610]

The sources described above, together with other sources of information and the Bureau's market knowledge, form the basis for the Bureau's consideration of the likely impacts of the proposed rule. The Bureau makes every attempt to provide reasonable estimates of the potential benefits and costs to consumers and covered persons of this proposal. While the Debt Collection Consumer Survey provides representative data on consumer experiences with debt collection, the survey responses generally do not permit the Bureau to quantify, in dollar terms, how particular proposed provisions will affect consumers. With respect to industry impacts, much of the Bureau's existing data come from qualitative input from debt collectors and other entities that operate in this market rather than representative sampling that would allow the Bureau to estimate total benefits and costs.

General economic principles and the Bureau's expertise in consumer financial markets, together with the data and findings that are available, provide insight into the potential benefits, costs, and impacts of the proposed rule. Where possible, the Bureau has made quantitative estimates based on these principles and the data available. Some benefits and costs, however, are not amenable to quantification, or are not quantifiable given the data available to the Bureau. The Bureau provides a qualitative discussion of those benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

D. Baseline for Analysis

In evaluating the potential benefits, costs, and impacts of the proposal, the Bureau takes as a baseline the current legal framework governing debt collection. This includes the requirements of the FDCPA as currently interpreted by courts and law enforcement agencies, other Federal laws, and the rules and statutory requirements promulgated by the States. In the consideration of benefits and costs below, the Bureau discusses its understanding of practices in the debt collection market under this baseline and how those practices would change under the proposal.

Until the creation of the Bureau, no Federal agency was given the authority to write substantive regulations implementing the FDCPA, meaning that many of the FDCPA's requirements are subject to interpretations in court decisions that are not always consistent or fully authoritative, such as a single district court opinion on an issue. Debt collectors' practices reflect their interpretations of the FDCPA and their decisions about how to balance effective collection practices against litigation risk. Many of the impacts of the proposed rule relative to the baseline would arise from changes that debt collectors would make in response to additional clarity about the most appropriate interpretation of what conduct is permissible and not permissible under the FDCPA's provisions.

E. Coverage of Proposal

The proposed rule would apply to debt collectors as defined in the FDCPA. This definition encompasses a number of types of businesses, which can be generally categorized as: Collection agencies, which collect payments owed to their clients, often for a contingency fee; debt buyers, which purchase delinquent debt and attempt to collect it, either themselves or through agents, or who may have as their principal purpose the collection of consumer debt; collection law firms that either have as their principal purpose the collection of consumer debt or regularly collect consumer debt owed to others; and loan servicers when they acquire servicing of loans already in default.

Although creditors that collect on debts they own generally would not be affected directly by the proposal, they may experience indirect effects. Creditors that hire or sell debts to FDCPA-covered debt collectors may experience higher costs if debt collectors' costs increase and if those costs are passed on to creditors. As described below, the Bureau believes that many compliance costs on FDCPA-covered debt collectors will be one-time costs to come into compliance rather than ongoing costs to stay in compliance. To the extent compliance costs are incurred only once to adjust existing debt collectors' systems and do not increase costs for new entrants, they are unlikely to be passed on to creditors.

F. Potential Benefits and Costs to Consumers and Covered Persons

The Bureau discusses the benefits and costs of the proposal to consumers and covered persons (generally FDCPA-covered debt collectors) in detail below.[611] The Bureau believes that an important benefit of many of the proposed provisions to both consumers and covered persons—compared to the baseline of the FDCPA as currently interpreted by courts and law enforcement agencies—is an increase in clarity and precision of the law governing debt collection. Greater certainty about legal requirements can benefit both consumers and debt collectors, making it easier for consumers to understand and assert their rights and easier for firms to ensure they are in compliance. The Bureau discusses these benefits in more detail with respect to certain provisions below but believes that they generally apply, in varying degrees, to all of the proposed provisions discussed below.

1. Prohibited Communications With Consumers

Proposed § 1006.6(b) generally would implement FDCPA section 805(a)'s prohibition on a debt collector communicating with a consumer at unusual or inconvenient times and places, with a consumer represented by an attorney, and at a consumer's place of employment. This section would also expressly prohibit attempts to make

with data necessary to understand experience and demographics of consumers who have been contacted by debt collectors. Consumers were selected using the Bureau's Consumer Credit Panel, a de-identified 1-in-48 sample of Americans with consumer reports at one of the nationwide CRAs. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 7–10.

[607] The Credit Card Database is a compilation of de-identified loan-level information from the credit card portfolios of large banks. *See* Bureau of Consumer Fin. Prot., *Credit Card Agreement Database, https://www.consumerfinance.gov/credit-cards/agreements/* (last visited May 6, 2019).

[608] For more information about Bureau data sources, see Sources and Uses of Data at the Bureau of Consumer Financial Protection (Sept. 2018), *https://www.consumerfinance.gov/data-research/research-reports/sources-and-uses-data-bureau-consumer-financial-protection/*.

[609] *See* CFPB Debt Collection Operations Study, *supra* note 45.

[610] *See* Small Business Review Panel Report, *supra* note 57.

[611] For purposes of the section 1022(b)(2) analysis, the Bureau considers any consequences that consumers perceive as harmful to be a cost to consumers. In considering whether consumers might perceive certain activities as harmful, the Bureau is not analyzing whether those activities would be unlawful under the FDCPA or the Dodd-Frank Act.

such communications, which debt collectors already must avoid given that a successful attempt would be an FDCPA violation. Proposed § 1006.14(h)(1) would interpret FDCPA section 806's prohibition on a debt collector engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt to prohibit debt collectors from communicating or attempting to communicate with consumers through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer.

Debt collectors are already prohibited from communicating with consumers at a time or place that is known or should be known to be inconvenient to the consumer. The Bureau therefore expects that debt collectors already keep track of what consumers tell them about the times and places that they find inconvenient and avoid communicating or attempting to communicate with consumers at those times or places. Similarly, the proposed provisions regarding communication with attorneys and at the consumer's place of employment track consumer debt collector practices that are already required to comply with the FDCPA. The Bureau understands that many debt collectors currently employ systems and business processes designed to limit communication attempts to consumers at inconvenient times and places and that many debt collectors also use these systems and processes to prevent communications with consumers through media that consumers have told them are inconvenient. The proposed provisions might benefit consumers and debt collectors by providing further clarity in the application of the requirements of FDCPA section 805(a) and 806, but the Bureau does not expect that the proposed provision would cause significant changes to debt collectors' existing practices.

2. Frequency Limits for Telephone Calls and Telephone Conversations

Proposed § 1006.14(b)(1) would prohibit a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Proposed § 1006.14(b)(2) provides that, subject to certain exceptions set forth in proposed § 1006.14(b)(3), a debt collector violates proposed § 1006.14(b)(1) if the debt collector places a telephone call to a person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days, or (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. Proposed § 1006.14(b)(4) would clarify the effect of complying with the frequency limits in § 1006.14(b)(2), stating that a debt collector who does not exceed the limits complies with § 1006.14(b)(1) and FDCPA section 806(5), and does not, based on the frequency of its telephone calls, violate § 1006.14(a), FDCPA section 806, or Dodd-Frank Act sections 1031 or 1036(a)(1)(B).

Potential benefits to consumers. Calls debt collectors make with intent to annoy, abuse, or harass consumers are likely to cause them harm, and the Bureau has evidence, discussed below and in part V, that many consumers perceive harm from debt collectors' repeated telephone calls.[612] The proposed provision would limit this harm by capping the frequency of telephone calls and telephone conversations.[613] FDCPA section 806 already prohibits conduct the natural consequence of which is to harass, oppress, or abuse any person. FDCPA section 806(5) also specifically prohibits repeated or continuous calling and telephone conversations with ''intent to annoy, abuse, or harass any person at the called number.'' These prohibitions have been interpreted differently by different courts, and while some debt collectors call consumers less frequently than the proposed frequency limits would permit, there are many debt collectors who place telephone calls to consumers or engage consumers in telephone conversations more frequently than the proposed frequency limits would permit.

To quantify consumer benefits from the proposed provision, the Bureau would need information regarding both how much the provision would reduce the number of calls debt collectors place to consumers and the benefit (or harm) each consumer would receive as a result of this reduction. Although the Bureau's data do not permit it to reliably quantify either the reduction in call frequency or how much borrowers would value this reduction in dollar terms, the discussion below summarizes the data available to the Bureau on these two points.

Data from the CFPB Debt Collection Consumer Survey indicate that debt collectors often may attempt to contact consumers more frequently than seven times per week. In the survey, 35 percent of consumers who had been contacted by a debt collector said the debt collector had contacted or attempted to contact them four or more times per week, including 14 percent who said the debt collector had contacted or attempted to contact them eight or more times per week.[614] Another 29 percent said that the debt collector had attempted to contact them one to three times per week.[615] The survey question did not ask respondents to distinguish between actual contacts and contact attempts, and consumers are likely not aware of all unsuccessful contact attempts. Still, the survey responses suggest that it is not uncommon for debt collectors to attempt to telephone consumers more than seven times per week, and the responses would be consistent with many debt collectors having live telephone conversations with consumers more frequently than the one time per week that generally would be permitted under the proposal.[616] Based on this, it is reasonable to estimate that at least 6.9 million consumers[617] are called by debt collectors more than seven times in one week during a year.

The CFPB Debt Collection Consumer Survey provides evidence that many consumers would benefit if they received fewer calls from debt collectors, although it does not provide

[612] The FDCPA's standard of liability for excessive calling is not perceived harm by consumers, but rather depends on the debt collector's intent or the ''natural consequence'' of the conduct. *See* FDCPA section 806(5) and 806, 15 U.S.C. 1692d(5) and 1692d. Nonetheless, section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of its regulation to consumers and covered persons, which may include potential benefits or costs that were not contemplated or intended by the FDCPA.

[613] The proposed rule could have the ancillary effect of preventing some calls that are not intended to annoy, abuse, or harass consumers and could in fact prevent some calls that consumers would find beneficial, as discussed below under ''Potential costs to consumers.''

[614] CFPB Debt Collection Consumer Survey, *supra* note 18, at 44 n.5.

[615] *Id.*

[616] Information from industry also confirms that debt collectors sometimes attempt to communicate more than seven times per week. See discussion under ''Costs to covered persons'' below.

[617] This is calculated as 14 percent of an estimated 49 million consumers contacted by debt collectors each year. The Bureau estimates that about 32 percent of consumers with a credit file, or about 67 million, are contacted each year by a creditor or debt collector attempting to collect a debt. Of those, 23 percent were most recently contacted by a creditor, 63 percent by a debt collector, and 15 percent did not know whether the contact was from a creditor or debt collector. Based on this, the Bureau estimates that 73 percent of consumers were contacted by a debt collector, assuming that the share of consumers contacted by a debt collector is the same in this group as it is among consumers who did know whether the most recent contact was from a debt collector. *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 13, 40–41.

evidence with which to estimate the dollar value of those benefits. Most respondents who had been contacted by a debt collector at least once per week said they had been contacted too often. As shown in Table 1, 95 percent of respondents who said debt collectors had contacted or attempted to contact them four or more times per week and 76 percent of those reporting contact or attempted contact one to three times per week said that they had been contacted too often by the debt collector, whereas 22 percent of those contacted less than once per week said they had been contacted too often.

TABLE 1—CONSUMERS INDICATING THEY HAD BEEN CONTACTED TOO OFTEN, BY CONTACT FREQUENCY

[Percent]

Contact frequency	Consumers who said they were contacted too often
Less than once per week	22
One to three times per week	76
Four or more times per week	95

The survey questions did not distinguish between contact attempts and contacts that result in a live communication. They also did not distinguish among different types of contact, and survey responses may have included contacts such as letters or emails that would not be included in the proposed limits.[618] Nonetheless, the results indicate that a large majority of consumers who are contacted at least once per week believe they are being contacted too frequently.

The Bureau's consumer complaint data also indicate that consumers find frequent or repeated calls harmful. Communication tactics ranked third in debt collection complaints submitted to the Bureau during 2018, and the majority of complaints in this category—55 percent, or about 6,000 complaints during 2018—were about frequent or repeated telephone calls.[619]

Although the Bureau does not have evidence that could be used to estimate the monetary value consumers attach to a reduction in call frequency, there is indirect evidence of costs consumers are willing to bear to avoid unwanted calls. One leading service that offers to block inbound ''robocalls'' to a consumer's cellular telephone charges $1.99 per month for the service and claims over 1,000,000 users. Such services are an imperfect analogy to the proposed frequency limits for at least two different reasons: First, they are intended to completely block calls rather than limit their frequency; and second, such services block telemarketing calls in addition to debt collection calls, while not blocking all debt collection calls. Given these differences, the price of this service does not provide a precise analog for the value to consumers of the proposed call frequency limits. Nonetheless, the example does provide evidence that many consumers are willing to pay prices in the range of $24 per year to avoid unwanted telephone calls.[620]

Some of the benefits from the proposed call frequency limits could be obtained if consumers used protections they already have under the FDCPA to help them avoid too-frequent debt collection calls. Debt collectors must cease most communications in response to a written request from the consumer to do so. Furthermore, because section 805(a)(1) of the FDCPA prohibits debt collectors from communicating about a debt at any time or place that the debt collector knows or should know is inconvenient to the consumer, debt collectors risk violating section 805(a)(1) if they do not take heed when consumers say they do not want to communicate at certain times or places. However, many consumers may not want to completely cease communication about a debt because, for example, debt collectors who cannot recover through such communications may initiate litigation to recover on the debt. Many consumers may also be unaware of their rights to limit whether and how debt collectors communicate with them. For example, consumers who tell debt collectors to cease communication orally may not benefit because some debt collectors may not respond to consumers' requests to limit communications unless they are made in writing. In the Debt Collection Consumer Survey, 42 percent of respondents who had been contacted about a debt in collection reported having requested that a creditor or debt collector stop contacting them.[621] These respondents generally did not make the request in writing.[622] Of these consumers, approximately 75 percent reported that the creditor or debt collector did not stop attempting to contact them.[623]

As discussed above, technological solutions are also increasingly available to consumers who want to avoid certain calls and may be used to screen out calls from some debt collectors. However, such solutions may be under-inclusive (in that they do not screen out calls from all debt collectors) or over-inclusive (in that a consumer may want to maintain some telephone contact with a debt collector rather than eliminating all calls from that debt collector).

Potential costs to consumers. Consumers may benefit from communicating with debt collectors about their debts. For consumers being contacted about a debt they in fact owe, communicating with the debt collector may help consumers resolve the debt, which could help avoid further fees and interest, credit reporting harms, or lawsuits. For consumers being contacted about a debt they do not owe, communications from debt collectors may alert consumers to errors in their credit reports or that they are victims of identity theft. During the meeting of the Small Business Review Panel, some debt collectors said that frequency limits could extend the period needed to establish contact with a consumer, as further discussed below under ''Potential costs to covered persons.'' If the proposed frequency limits mean that debt collectors are less able to reach some consumers, or that communication with some consumers is delayed, those consumers may be harmed.

To quantify any such harm, the Bureau would need data to estimate how the proposed frequency limits would affect whether and when debt collectors communicate with consumers as well as the harm consumers

[618] The survey suggests that contact attempts from debt collectors other than by telephone or letter are relatively uncommon. *Id.* at 42, table 22. The Bureau understands that debt collectors seldom send letters more than once per week, so the survey responses suggest that a large majority of contact attempts are by telephone.

[619] *See* 2018 FDCPA Annual Report, *supra* note 16, at 16–17, table 1. Also note that consumers can identify only one issue to categorize their complaints, so that the count does not include cases in which a consumer chooses a different issue (such as ''I don't owe the debt'') but still express concern about call frequency.

[620] Another source of indirect evidence on the value to consumers of reduced call frequency is the Bureau's consumer complaints. The Bureau received approximately 6,000 complaints about call frequency during 2018. *See id.* Based on the Bureau's records, the average time for a consumer to file a complaint with the Bureau by telephone or through the web portal is approximately 15 minutes, although this varies over time and across complaint categories. Valuing consumers' time using the average U.S. private sector wage of approximately $27 per hour suggests that some consumers are willing to give up approximately $6.75 worth of their time in hopes of reducing call frequency from one debt collector. *See* U.S. Dept. of Labor, Bureau of Lab. Stat., *Economic News Release: Employment Situation,* table B–3 (Feb. 1, 2019), *https://www.bls.gov/news.release/empsit.t19.htm.*

[621] CFPB Debt Collection Consumer Survey, *supra* note 18, at 35, table 17.

[622] Of consumers who asked not to be contacted, 87 percent said they made the request by telephone or in person only. *Id.* at 34–35.

[623] *Id.*

experience when they do not communicate with debt collectors. The Bureau discusses the available evidence on how the proposed frequency limits would affect whether debt collectors communicate with consumers below in its discussion of costs to covered persons. As discussed there, the data are limited, but evidence the Bureau does have suggests that the proposed limits might somewhat reduce the number of consumers reached by telephone within a few months after a debt collector starts attempting contact, but that the reduction is likely to be limited to a relatively small fraction of debts.

The Bureau does not have representative data that can be used to quantify the harm consumers experience when they do not communicate with debt collectors, or when those communications are delayed. If consumers do not communicate with debt collectors about debts, they could suffer additional harm from debt collection in some cases, particularly if the debt collector or creditor initiates a lawsuit. A suit could lead to increased fees, legal costs, and the possibility of a judgment that could lead to garnishment of wages or other legal steps to recover the debt.

To the extent that some debt collectors currently call less than the proposed frequency limits to avoid legal risks, such debt collectors could increase their calling frequency as a result of the proposal. This would result in costs to some consumers if they find the increase in call frequency harmful.

Potential benefits to covered persons. As with several other provisions of the proposed rule, the proposed limits would reduce legal uncertainty about the interpretation of existing FDCPA language. Frequent telephone calls are a consistent source of consumer-initiated litigation and consumer complaints to Federal and State law enforcement agencies. By establishing a clear standard for call frequency, the proposed provision would make it easier for debt collectors to know what calling patterns are permitted and avoid the costs of litigation and threats of litigation. To the extent that some debt collectors currently call less than the proposed frequency limits to avoid legal risks, such debt collectors could increase their calling frequency, potentially increasing collection revenue.

Some debt collectors might also benefit from a reduction in calls made by other debt collectors. The Bureau understands that many consumers have multiple debts being collected by different debt collectors.[624] In seeking payments from consumers, multiple debt collectors compete with each other for consumers' attention, which can lead to a large aggregate number of debt collection calls, potentially overwhelming some consumers and making them less likely to answer calls or otherwise engage with debt collectors.[625] This in turn could make it harder for each debt collector to recover outstanding debt.[626] Thus, one potential benefit to debt collectors of the proposed call frequency limits is a lower frequency of telephone calls by other debt collectors, which could make consumers more likely to engage and repay.

In addition, some debt collectors specialize in approaches to collection that do not rely on frequent call attempts, and these debt collectors may benefit from the proposed call frequency limits. In particular, debt collectors who focus on litigation and those who communicate with consumers primarily by means not covered by the proposed limits, such as letters and emails, may be more effective in communicating with consumers relative to debt collectors who are affected by the proposed limits. This, in turn, may increase their market share at the expense of debt collectors who are more dependent on frequent calls.

Potential costs to covered persons. The proposed provision would impose at least two categories of costs on debt collectors. First, it would mean that debt collectors must track the frequency of outbound telephone calls, which would require many debt collectors to bear one-time costs to update their systems and train staff, and which would create ongoing costs for some debt collectors. Second, for some debt collectors, the proposed provision would require a reduction in the frequency with which they place telephone calls to consumers, which could make it harder to reach consumers and delay or reduce collections revenue.

With respect to one-time implementation costs, many debt collectors would incur costs to revise their systems to incorporate the proposed call frequency limits. Such revisions could range from small updates to existing systems to the introduction of completely new systems and processes. The Bureau understands that larger debt collectors generally already implement system limits on call frequency to comply with client contractual requirements, debt collector internal policies, and State and local laws.[627] Such debt collectors might need only to revise existing calling restrictions to ensure that existing systems comply with the caps. Larger collection agencies might also need to respond to client requests for additional reports and audit items to verify that they comply with the caps, which could require these agencies to make systems changes to alter the reports and data they produce for their clients to review.

Smaller debt collectors and collection law firms are less likely to have existing systems that track or limit calling frequency, and may therefore face larger costs to establish systems to do so. However, many smaller debt collectors report that they generally attempt to reach each consumer by telephone only one or two times per week and generally do not speak to a consumer more than one time per week, which suggests that their practices are already within the proposed frequency limits.[628] For such debt collectors, existing policies may be sufficient to ensure compliance with the proposed provision.

With respect to ongoing costs of compliance, the Bureau expects that the proposed limit on call attempts in § 1006.14(b)(2)(i) could have an impact on some debt collectors' ability to reach consumers, particularly when the debt collector has not yet established contact with a consumer. These impacts are discussed below. The Bureau's understanding, based on feedback from small entity representatives and other industry outreach, is that the proposed limit of one telephone conversation per week in § 1006.14(b)(2)(ii) is unlikely to affect debt collectors' ability to communicate with consumers in most cases.[629] [630]

[624] The Bureau's survey indicates that 72 percent of consumers with a debt in collection were contacted about two or more debts in collection, and 16 percent were contacted about five or more debts. *Id.* at 13, table 1.

[625] For example, borrowers could simply ignore telephone calls or could adopt call screening or blocking technology.

[626] In other words, debt collectors may face a ''prisoner's dilemma,'' in which each debt collector has incentives to call more frequently even though debt collectors might collectively benefit from a mutual reduction in call frequency.

[627] *See* CFPB Debt Collection Operations Study, *supra* note 45, at 28–29.

[628] *See id.* at 29.

[629] The impact might be greater if consumers could not consent to more frequent contact. For example, if a debt collector reached a consumer on the telephone and the consumer said it was not a good time to speak, then the proposal would permit the debt collector and consumer to agree to speak again at a specified time within less than one week. See the section-by-section analysis of proposed § 1006.14(b)(3)(ii).

[630] Similarly, the Bureau expects that debt collectors would be largely unaffected by the proposal to apply the frequency limits to location contacts with third parties because the Bureau understands that while location calls may be made

Continued

The proposed limit of placing no more than seven telephone calls per week would cause many debt collectors to place telephone calls less frequently than they currently do. This decrease in telephone calls may impose ongoing costs on debt collectors by increasing the time it takes to establish contact with consumers. Most debt collectors rely heavily on telephone calls as a means of establishing contact with consumers. While debt collectors generally send letters in addition to calling,[631] the Bureau understands that response rates to letters can be quite low. If contact with consumers is delayed, it will delay collection revenue and may reduce revenue if consumers who are reached later are less willing or able to repay the debt. In addition, if the debt collector is unable to reach the consumer using the permitted number of telephone calls during the period the owner of the debt permits the debt collector to attempt to collect the debt, then the call frequency limits might prevent a debt collector from reaching the consumer entirely.[632]

Some debt collectors do not place telephone calls frequently enough to be affected by the proposed caps. While the Bureau understands that some debt collectors regularly call consumers two to three times per day or more, others have told the Bureau that they seldom attempt to call more than once or twice per week. These differences may reflect different debt types and collection strategies. For example, smaller debt collectors frequently retain debts indefinitely, and they may face less pressure to reach consumers quickly than debt collectors who collect debts for a limited period. Debt collectors who focus on litigation may also place less emphasis on establishing telephone communication with consumers.

Some debt collectors have indicated that frequent calling is especially important if the debt collector has multiple potential telephone numbers and does not know the best way to reach the consumer.[633] Additionally, some debt collectors specialize in attempting to collect debts for which the creditor has lost contact with the consumer, and frequent call attempts to establish contact with the consumer may be especially important for such debt collectors.

For debt collectors who currently call consumers more frequently, the proposed frequency limits could affect when and if they establish communication with consumers. The Bureau does not have representative data that would permit it to quantify how the proposed limits on call frequency would impact how long it takes to establish contact or whether contact is established at all. However, the Bureau has analyzed microdata on outbound calling from one large collection agency (Calling Data) that helps illustrate the potential impact of the proposed limits. While the data from this agency may not be representative of the market as a whole, the results of the Bureau's analysis of the data are generally consistent with summary information shared by other large collection agencies.[634]

The Calling Data show that, in the first eight weeks of collections, the overall frequency of call attempts to consumers who have not yet spoken with the debt collector declines slowly. Roughly 40 percent of consumers receive more than seven calls per week in the first four weeks, but this drops to 27 percent by week eight. Although the overall distribution of contact attempts changes slowly from week to week, the data show that over time some consumers get called more, while others get called less. Consumers with whom a ''right-party contact'' (RPC) has been established and who made no payment and consumers for whom RPC has not been achieved tend to receive the most collection calls. Consumers who have engaged but made a partial payment receive fewer calls. Moreover, the debt collector who provided the Calling Data engages in ''call sloping,'' meaning that it places fewer total calls each week that it works a portfolio of debts.

The Calling Data show that, for the debts included in that data set, consumers who take longer to reach are not less likely to pay. Although the probability that each call results in an RPC declines with successive calls, the rate at which RPCs are translated into payments increases steadily through at least the first 50 calls. As a result, an RPC that is achieved in any of the first 50 calls is approximately equal in value to the debt collector as an RPC that is achieved with fewer calls, suggesting that call attempts remain important to debt collection even after many calls have been attempted.

Summary data provided by some other large debt collectors indicate that the number of calls needed to reach consumers can vary considerably, but that the majority of debts would not be affected or would be affected very little by the proposed frequency limits. These data indicate that 50 percent or more of consumers who are ultimately reached by these debt collectors are reached within the first seven calls overall (not per week), though other debt collectors have indicated that it takes 15 to 21 calls to reach 50 percent of such consumers. These data also indicate that reaching 95 percent of consumers may take between 50 and 60 calls, meaning that 5 percent of consumers reached are contacted only after more than 50 or 60 communication attempts.

There are limitations to using the data discussed above to make inferences about how limits on telephone calls may affect debt collectors' ability to reach consumers. This is in part because establishing contact depends on factors other than the number of calls made (*e.g.,* the time of day called) and in part because debt collectors subject to frequency limits might change their contact behavior in ways that permit them to reach a given number of consumers with fewer calls, as discussed further below. In addition, other aspects of the proposed rule, including the provision that would clarify the legal status of limited-content voice messages, could make it easier for debt collectors to reach consumers with a smaller number of calls.

The data discussed above may not be representative, meaning that some debt collectors might need more or fewer calls to reach similar numbers of consumers. Overall, however, the available data suggest that the proposed limits would somewhat reduce the ability of debt collectors to reach consumers by telephone within a few months, but that the reduction is likely to be limited to a relatively small fraction of debts. This could affect primarily debt collectors who receive placements of debts for four to six months and do not engage in litigation. Such debt collectors could lose revenue if the limits prevent them from

to several numbers, they do not generally involve frequently calling each number.

[631] In the Bureau's survey, 85 percent of respondents who had been contacted by a debt collector said that they had been contacted by telephone and 71 percent said that they had been contacted by letter. Respondents were asked to select all ways in which they had been contacted. CFPB Debt Collection Consumer Survey, *supra* note 18, at 29–30, table 14.

[632] If the provision were to cause some debt collectors to lose revenue for this reason, the amounts not collected would generally be transferred to another party: Either to consumers (if the amounts were never collected) or to another debt collector (if the amounts were collected through further collection efforts, including through a lawsuit).

[633] *See, e.g.,* Small Business Review Panel Report, *supra* note 57, at appendix A (letter from Venable).

[634] The summary information was shared with Bureau staff during industry outreach meetings that are part of the Bureau's routine market-monitoring efforts. Although most debt collectors are small firms, evidence suggests that a majority of debt collected is collected by collection agencies with 100 or more employees. *See* CFPB Debt Collection Operations Study, *supra* note 45, at 7.

establishing contact with consumers or if collections based on telephone calls become less effective and, as a result, creditors place more debts with debt collectors specializing in litigation.

To illustrate potential effects of the provision on debt collector revenue, the Bureau used the Calling Data to simulate the effect of the proposed frequency limits under specific assumptions about how the call frequency limits affect collections. That is, the Bureau created a ''but-for'' version of the Calling Data in which calls that would not have been permitted under the proposed frequency limits were assumed to have been either delayed or eliminated, and compared RPCs and payments in this ''but-for'' data with the actual outcomes achieved by the debt collector. This is at best a rough approximation of the effects of the proposed provision, both because it relies heavily on the assumptions made and because it is based on the data of one particular debt collector, and may not be representative of other firms in the industry.

The Bureau created two versions of its simulation analysis, one of which uses more conservative assumptions as to the impact of the proposed provision on successful contacts and collections. However, the Bureau believes that even the more conservative version of this analysis likely overstates the potential effects of the proposed frequency limits because it cannot reflect any changes the debt collector would make to its calling strategy in response to the frequency limits. That is, one would expect a rational collection firm to strategically choose which calls to eliminate or delay in response to the proposed frequency limits, while the Bureau's analysis must to some extent select calls arbitrarily. In particular, at least for the debt collector who provided data to the Bureau, debts with multiple telephone numbers would be most likely to be affected by the frequency limits. The Bureau is not able to identify telephone type (such as mobile vs. landline, or work vs. home) in the data, but the debt collector would generally be able to do so. The Bureau would expect debt collectors in similar situations to omit calls to less promising telephone numbers, rather than call the same telephones and cease calling earlier in the process.

In the first, more conservative version of the simulation (Version 1), the Bureau assumed that all calls in excess of the proposed frequency limit each week were simply shifted to the next week.[635] The Bureau assumed that any successful RPCs that occur after the 25th simulated week would never occur under a frequency limit because in reality the debt collector was only contracted to collect on the debts in the data for up to 25 weeks. Version 1 implicitly assumes that the probability that a call results in an RPC does not depend on how much time has passed since collection began, only on the number of calls that have been made.

In a second, more aggressive version of the simulation (Version 2), the Bureau assumed that any calls that would be above the proposed frequency limit are eliminated, rather than shifted forward. When a consumer's first RPC would have occurred on a call that would not be permitted under the proposed frequency limit in a given week, the Bureau treats the data for that debt as censored as of that week.[636]

The Bureau made additional assumptions that were common to both versions of the simulation. For inbound calls, that is, calls from consumers to the debt collector, the Bureau assumed that the calls were not delayed or eliminated. Thus, the Bureau is implicitly assuming that inbound calls are prompted by letters from the debt collector or other external factors, rather than by a number of calls.[637] The Bureau also made additional assumptions to simulate the effect on payments. The Calling Data indicate if the consumer ever paid and how much, but they do not always indicate when payment was received—the Bureau observes the timing of payments only if the consumer made a payment over the telephone. About one-half of all consumers in the data who make at least a partial payment do so without ever having an RPC. For the simulation, the Bureau assumed that, if the debt collector achieved at least one RPC in the simulation, then the amount of any payments made by the consumer is unchanged. If the consumer received an RPC in the original data but did not receive any RPC in the simulation, the Bureau assumed that any payments recorded in the original data did not occur for purposes of the simulation.

Table 2 shows the results of the simulation analysis described above. Under Version 1, the proposed frequency limit would reduce first RPCs by 2.76 percent of the first RPCs and dollars collected by 1 percent.[638] The average first RPC would be delayed by less than one week. These effects are not evenly distributed across consumers, however. In the simulation, the debt collector is much more likely to miss an RPC or payment when it calls multiple telephone numbers for a consumer.[639] For consumers where the debt collector calls only one telephone number, hardly any miss an RPC in the simulation, and the average delay is almost zero. This is because the debt collector rarely calls a particular telephone more than seven times per week. In contrast, for consumers where the debt collector calls five or more telephone numbers, the simulation predicts that the frequency limit would eliminate more

[635] For example, if the debt collector called a particular consumer 10 times in the first week, eight times in the second week, and five times in the third week, in the Bureau's simulation, the last three calls in the first week would become the first three calls in the second week. The second week would then have a total of 11 calls, and the last four calls would become the first four calls in the third week. The third week would then have eight calls, so the last call would become the first call of the fourth week, and so on.

[636] That is, the Bureau assumes that it does not know when or whether that consumer would ever have a successful RPC, only that there was no RPC up until that week. The Bureau then calculates the percent of debts with an RPC by the 25th week of collections using the Kaplan-Meier product limit estimator for the survival function, a standard tool for measuring rates of an outcome when some observations are censored. It is necessary to assume that such consumers are censored because in reality after an initial RPC, the debt collector generally changes its calling behavior, particularly if it obtains a promise to pay.

[637] The debt collector who provided the data does not leave voicemails, but it is possible that consumers eventually return a call in response to repeated missed calls on their telephones.

[638] The change in payments is less than the change in RPCs both because some consumers pay without an RPC (and the Bureau assumed this did not change in the simulation) and because consumers in the data who had an earlier first RPC, and thus were less likely to be affected by the frequency limits, were also more likely to pay in full.

[639] The Bureau does not observe in the data how many telephone numbers the consumer has, only how many the debt collector chooses to call.

than 7 percent of RPCs and delay the remaining RPCs by almost two weeks.

The assumptions of Version 2 suggest a more substantial effect on RPCs and collections, although the Bureau notes again that even Version 1 likely overstates the potential effect of the proposed provision. The simulation predicts that RPCs would decline by 15.7 percent, and dollars collected would decline by 7.7 percent.

TABLE 2—RESULTS OF SIMULATION ANALYSIS

Version	Assumed effect of proposed call frequency limit	Percent change in RPCs within 25 weeks	Average delay in remaining RPCs (weeks)	Percent change in dollars collected within 25 weeks
Version 1	Calls above limit roll to next week	−2.76	0.85	−1.04
Version 2	Calls above limit eliminated	−15.7	0	−7.7

Overall, the Bureau believes that the simulation analysis overstates the potential effect of the provision because it ignores any changes debt collectors would make to mitigate the effects of the call frequency limit. Nevertheless, certain assumptions that the Bureau makes for simplicity likely reduce the predicted impact of the provision. In particular, in Version 1 the Bureau assumes that a call with an RPC that is shifted later due to the proposed frequency limit will remain an RPC. This may not be true in practice. Empirically, the probability that a call results in an RPC declines over time—this is evident in the data examined by the Bureau and is consistent with input from industry stakeholders. If consumers are less likely to answer the telephone as time passes, irrespective of the number of calls debt collectors have made, the proposed frequency limit could reduce payments and revenue by a larger fraction than the simulation suggests (assuming no re-optimization by debt collectors).[640]

Debt collectors could take steps to reduce the number of calls necessary to establish contact and mitigate any lost revenue from the proposed frequency limit. As indicated, if multiple telephone numbers are available, debt collectors might reduce their calls to numbers that they can identify as being less likely to yield a successful contact. In addition, the Bureau understands that debt collectors can reduce the number of calls needed to establish an RPC by purchasing higher-quality contact information from data vendors.

In addition and as discussed below, the Bureau's proposed rule also includes provisions that could reduce the legal risks associated with other means of communication, such as voice messages or emails, which could enable debt collectors to reach consumers more effectively with fewer calls. This could mitigate the impact of call frequency limits and might mean that the net effect of the proposal would be to increase the likelihood that debt collectors are able to reach consumers. In addition, debt collectors who are unable to reach consumers as a result of frequency limits might still pursue such debts through litigation. To the extent that frequent call attempts play a more important role in collecting certain types of debt relative to others, some debt collectors might shift their business toward collecting those types for which frequent calls are less important.

The Bureau requests data and other information about the benefits and costs of the proposed frequency limits for both consumers and debt collectors. In particular, the Bureau requests data and other information on current calling practices, how those practices are likely to be affected by the proposed frequency limits, and how those changes are likely to affect debt collectors' ability to contact consumers.

Alternative approaches to limiting the frequency of communications or communication attempts. The Bureau considered alternatives to the proposed frequency limits on debt collector telephone calls and telephone conversations. The potential benefits and costs of those alternatives to consumers and covered persons relative to the proposal are discussed briefly below.

The Bureau considered proposing a broader version of proposed § 1006.14(b)(1)(i) that would have prohibited repeated or continuous attempts to contact a person by other media, such as by sending letters, emails, or text messages to a person in connection with the collection of a debt. Such an approach could provide additional benefits to consumers if they are harassed or abused by frequent communication from debt collectors who use such media. However, as discussed in part V, the Bureau is not aware of evidence demonstrating that debt collectors commonly harass consumers or others through repeated or continuous debt collection contacts by media other than telephone calls. The cost of sending letters is much higher than that of placing telephone calls, which likely discourages frequent communication by mail, and the Bureau has received few complaints about debt collectors sending excessive letters. The Bureau understands that few debt collectors currently communicate by email or text message, and stakeholders have suggested that such media may be inherently less harassing than telephone calls because, for example, recipients may have more ability to decide whether or when to engage with an email or a text message than with a debt collection telephone call.

In addition, during the SBREFA process, some small entity representatives suggested that compliance with a rule that limited the frequency of communications by media other than telephone calls would be more costly than compliance with a rule that applied only to calls. These small entity representatives indicated that, while many existing debt collection systems already track the frequency of telephone calls, modifying systems to

[640] Another assumption that might reduce the predicted effect of the proposed frequency limits in both versions is the assumption that payment is tied to whether or not the first RPC occurs. For instance, in Version 1, the Bureau assumed that a consumer would not pay under the frequency limits only if the first RPC would have occurred after the 25th week in the simulation. Yet about a quarter of consumers in the data who eventually pay some portion of their debt had at least two RPCs. It may be that the subsequent RPCs were necessary for the payment to occur, but the Bureau's analysis did not track whether subsequent RPCs occurred after the 25th week under the simulated frequency limits. The Bureau also notes there is an implicit assumption in both versions of the simulation that could lead to overstating the effect of the proposed frequency limits. The simulation assumes that, if all RPCs for a consumer were eliminated by the proposed frequency limits, then the consumer would never pay. Given that, as noted above, a substantial number of consumers in the original data pay despite having no RPCs, it is possible that some consumers whose RPCs were eliminated by the proposed frequency limits would nonetheless pay something eventually.

track communication by other media would be significantly more expensive.

The Bureau also considered a proposal that would have limited the number of calls permitted to any particular telephone number (*e.g.,* at most two calls to each of a consumer's landline, mobile, and work telephone numbers). The Bureau considered such a limit either instead of or in addition to an overall limit on the frequency of telephone calls to one consumer. Such an alternative could potentially reduce the effect of frequency limits on debt collector calls if it permitted more total calls when a consumer has multiple telephone numbers. Such an approach could impose smaller costs on debt collectors in some cases by making it easier to contact consumers for whom debt collectors have multiple telephone numbers. At the same time, such an approach might provide smaller consumer benefits compared to the proposal by potentially permitting a high frequency of calls in some cases. Some consumers could receive (and some debt collectors could place) more telephone calls simply based on the number of telephone numbers that certain consumers happened to have (and that debt collectors happened to know about). Such an approach also could create incentives for debt collectors to, for example, place telephone calls to less convenient telephone numbers after exhausting their telephone calls to consumers' preferred numbers.

3. Limited-Content Messages

Proposed § 1006.2(j) would define a limited-content message as a message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content. In particular, proposed § 1006.2(j)(1) provides that a limited-content message must include all of the following: The consumer's name, a request that the consumer reply to the message, the name or names of one or more natural persons whom the consumer can contact to reply to the debt collector, a telephone number that the consumer can use to reply to the debt collector, and, if applicable, a disclosure explaining how the consumer can stop receiving messages through a particular medium.[641] Proposed § 1006.2(j)(2) provides that a limited-content message also may include one or more of the following: A salutation, the date and time of the message, a generic statement that the message relates to an account, and suggested dates and times for the consumer to reply to the message. Proposed § 1006.2(b) and (d), which define the terms attempt to communicate and communication, respectively, provide that a limited-content message is an attempt to communicate but is not a communication.

Potential benefits and costs to consumers. As discussed below under ''potential benefits and costs to covered persons,'' many debt collectors currently do not leave voice or text messages for consumers because of the risk of litigation. The Bureau expects that, by clarifying that ''communication'' for purposes of the FDCPA does not include the proposed limited-content message, the proposed rule would make debt collectors more likely to leave voice or text messages if they are unable to reach consumers by telephone.

In general, an increased use of voice and text messages should make it more convenient for consumers to communicate with debt collectors because consumers will be better able to arrange a discussion at a time that is convenient for them rather than at a time when the debt collector happens to reach them. Related to this, some consumers express annoyance at receiving repeated calls from callers who do not leave messages. To the extent that debt collectors respond to the proposed rule by leaving messages when a consumer does not answer the telephone, the proposal might help address that problem.

If more debt collectors are willing to leave messages, it may lead to an indirect benefit to consumers by reducing the number of unwanted call attempts without reducing the likelihood that consumers communicate with debt collectors. Although some debt collectors may leave frequent messages or continue to call frequently despite having left messages, an industry trade publication recommends a best practice of waiting three to seven days after leaving a message to give the consumer an opportunity to return the call.[642] During the meeting of the Small Business Review Panel, small entity representatives indicated that limited-content messages would reduce the need for frequent calling.[643] Thus, some consumers may experience reduced numbers of calls if more debt collectors leave messages and wait for a return call.

Debt collectors cannot be certain that a voice message will be heard only by the consumer for whom it was left. Some consumers could be harmed by an increase in limited-content messages, either because they are harassed by frequent messages or because the messages increase the risk of third-party disclosure. Although the message itself would not convey any information about the debt, some third parties who hear the message may discover that the caller is a debt collector, either because they have familiarity with the type of generic messages that debt collectors leave or because they do further research, such as by researching the telephone number. On the other hand, the proposal might lead debt collectors who currently leave more detailed messages that risk revealing the purpose of the call to third parties to switch to messages that reveal no information about the debt. In such instances, the impact of the proposal may be to reduce the likelihood of third-party disclosures.

Survey results indicate that consumers are concerned about third parties overhearing voice messages left by debt collectors, with nearly two-thirds of consumers saying it is very important that others do not hear or see a message from a creditor or debt collector, as shown in Table 3 below. However, most respondents also said that they would prefer that a voice message from a debt collector indicate that the caller is attempting to collect a debt. Even among consumers who said it was ''very important'' that others not see or hear messages about debt collection, 63 percent said they preferred that the purpose of the call be included in a message from a creditor or debt collector attempting to collect the debt. This suggests that many consumers either do not expect third parties to overhear voice messages left for them or attach greater importance to knowing what the call is about than to the risk a third party will overhear the message.

[641] As discussed below, proposed § 1006.6(e) would require a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a particular email address, telephone number for text messages, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number.

[642] insideARM, *Operations Guide: Call Volume* 10 (Nov. 14, 2014).

[643] Small Business Review Panel Report, *supra* note 57, at 25.

TABLE 3—PREFERENCES REGARDING OTHERS SEEING OR HEARING DEBT COLLECTOR MESSAGE

[Percent]

Importance of others not seeing or hearing a message	All consumers	Consumers contacted about a debt in collection
Very important	64	65
Somewhat important	23	24
Not at all important	14	10

Potential benefits and costs to covered persons. The Bureau understands that many debt collectors avoid leaving messages, or leave them only under limited circumstances, because of the legal risk associated with leaving a message. Currently, debt collectors leaving a voice message for a consumer either omit the disclosure stating that the call is from a debt collector (the so-called ''mini-Miranda'' warning) and risk being deemed in violation of FDCPA section 807(11) or include that disclosure and risk that the existence of a debt will be disclosed to a third party hearing the message and that they will be deemed in violation of FDCPA section 805(b). The proposed provision would reduce both direct and indirect costs to some debt collectors by interpreting the FDCPA not to require the mini-Miranda warning in a limited-content message, which would reduce legal risks associated with messages.

Debt collectors may indirectly benefit from clarification of the type of messages that may be left because messages may make it easier to establish contact with consumers. Currently, many debt collectors limit or avoid leaving messages for fear of FDCPA liability.[644] Leaving messages may be a more efficient way of reaching consumers than repeated call attempts without leaving messages. For example, consumers who do not answer calls from callers they do not recognize might return a message. If so, the proposed provision could permit debt collectors to reach such consumers with fewer contact attempts.

The proposal may also reduce the direct costs of voicemail-related litigation, which can be large.[645] While the Bureau does not have data on the costs to debt collectors of defending such litigation, some debt collectors have suggested that resolving an individual lawsuit typically costs $5,000 to $10,000, and resolving a class action could cost much more. Moreover, debt collectors report that the large majority of threatened lawsuits are settled before a suit is filed, so the frequency of filed lawsuits substantially understates how often debt collectors bear costs from claimed FDCPA violations.[646] The Bureau anticipates that the proposed clarification of the definition of communication would significantly reduce any legal risk to debt collectors of leaving voice messages that fit within the definition of limited-content message.

The proposed provision would generally not require debt collectors to incur new costs because it would not require any debt collectors to change their policies regarding messages. However, in order to obtain benefits from the provision, debt collectors who plan to adopt the practice of leaving limited-content messages would incur one-time costs to develop policies and procedures to implement limited-content messages under the rule and to train employees on these policies and procedures.

The Bureau requests data and other information about the benefits and costs to consumers and covered persons of the proposed limited-content messages. In particular, the Bureau requests information that is informative of how consumers would respond to limited-content messages, how the proposed limited-content messages would affect debt collectors' ability to contact consumers, and the one-time and ongoing costs to debt collectors who plan to adopt the practice of leaving limited-content messages.

4. Time-Barred Debt: Prohibiting Suits and Threats of Suit

Proposed § 1006.26(b) would prohibit a debt collector from suing or threatening to sue on a debt that the debt collector knows or should know is time-barred.

As discussed in part V, multiple courts have held that the FDCPA prohibits suits and threats of suit on time-barred debt. In light of this, the Bureau understands that most debt collectors do not knowingly sue or threaten to sue consumers to collect time-barred debts, and therefore the Bureau does not expect this provision of the proposed rule to have a significant effect on most consumers or debt collectors.[647]

To the extent that there are costs to covered persons or benefits to consumers from this provision, they will most likely come from reduced payments on time-barred debts, to the extent that some debt collectors currently use lawsuits or threats to sue on time-barred debts as a strategy to elicit payment.[648] If it is currently true that (1) suing or threatening to sue on debts is an important means of collection for debts for which the statute of limitations is close to expiring, and (2) most debt collectors stop suing or threatening to sue once the statute of limitations for a debt expires, then one

[644] In the Bureau's Debt Collection Operations Study, 42 of 58 respondents reported sometimes leaving voice messages. Of those that do leave voice messages, many reported leaving them only under certain specific circumstances. CFPB Debt Collection Operations Study, *supra* note 45, at 29–30.

[645] There were at least 162 voicemail-related lawsuits filed in 2015 under section 805(b) of the FDCPA, which prohibits third-party disclosures; of these, 11 cases were class actions. In addition, at least 125 voicemail-related lawsuits were pursued under section 807(11), which prohibits communicating with a consumer without providing the mini-Miranda disclosure; of these 49 cases were class actions. *See* Small Business Review Panel Outline, *supra* note 56, at 69 n.104 (citing data provided by WebRecon, LLC).

[646] Some debt collectors have reported that they receive approximately 10 demand letters for every lawsuit filed and that FDCPA claims are typically settled for $1,000 to $3,000. *See id.* at 69 n.105.

[647] For example, small entity representatives at the meeting of the Small Business Review Panel indicated that it was standard practice in the industry not to knowingly initiate lawsuits to collect time-barred debt. *See* Small Business Review Panel Report, *supra* note 57, at 35. Some industry groups have adopted policies requiring members to refrain from suing or threatening to sue on time-barred debts. *See, e.g.,* Receivables Mgmt. Ass'n, *Receivables Management Certification Program* at 32 (Jan. 19, 2018), *https://rmassociation.org/wp-content/uploads/2018/02/Certification-Policy-version-6.0-FINAL-20180119.pdf.*

[648] As noted above in section V, although multiple courts have held and the FTC has stated that suing or threating to sue on time-barred debts violates the FDCPA, the Bureau's enforcement experience has shown that some debt collectors may continue to sue or threaten to sue on time-barred debts. The proposal could reduce such activity by eliminating any legal uncertainty about whether such suits or threats of suit are permitted and potentially by strengthening enforcement of the prohibition.

would expect repayment rates to drop after the statute of limitations expires, and that drop might be made more significant by the proposed provision. Such a reduction in payments would benefit consumers who owe the debts while imposing costs on debt collectors and creditors and potentially increasing the cost of credit generally.

The Bureau therefore attempted to indirectly measure the potential effect of the provision by examining the behavior of consumers who owe debts that either recently expired or are close to expiring under their state's statutes of limitations. To do so, the Bureau used data from its Consumer Credit Panel (CCP), which contains information from one of the three nationwide CRAs. The Bureau used data from the CCP to attempt to estimate the current effect of State statutes of limitation on the propensity of consumers to pay old debts in collection.

The CCP contains information on collections tradelines—records that were furnished to this nationwide CRA by third-party debt collectors or debt buyers. The Bureau analyzed these data to determine whether the probability of payment declines around the expiration of the statute of limitations in the consumer's State. Specifically, the Bureau followed debts reported in the CCP from the time they were first reported on consumers' credit records until they either showed some record of payment or disappeared from the credit records.[649] In this analysis, the Bureau assumed that the applicable statute of limitations is the one applicable to written contracts in the consumer's State of residence and that the statute of limitations begins for a debt on the date that the debt first appears on the consumer's credit report.[650] The Bureau assumed this starting date because there was no other reasonable basis in the available data to assign the beginning of the statute of limitations. There is likely to be some inaccuracy in this assumption due to a variety of factors, including delays between the beginning of the period defined by the statute of limitations and the first report and cases in which the applicable statute of limitations is not the one in the consumer's State. However, if the estimated expiration of the statute of limitations is at least approximately correct in most cases, then one would expect to observe whether the expiration of the statute of limitations has an effect on the likelihood that a debt is reported to have been paid.

The Bureau calculated the probability of payment occurring after a given number of days, conditional on no payment occurring before—in technical terms, the ''hazard rate'' for payments—for all collections tradelines in the CCP. The Bureau then calculated the average hazard rate based on the number of months before or after the estimated expiration of the applicable statute of limitations. This calculation is plotted in Figure 1, below.[651] The figure shows that the probability of a collections tradeline showing evidence of payment declines steadily for at least one year leading up to the estimated expiration of the statute of limitations, and continues to decline at roughly the same rate afterwards.[652] Thus, while the probability of payment declines over time, the reduced ability to pursue litigation does not seem to materially affect payments on collections tradelines. Combined with the Bureau's understanding that debt collectors generally do not sue on time-barred debt, this suggests that the proposed provision would be unlikely to cause any further reduction in the rate of repayment on time-barred debt.[653]

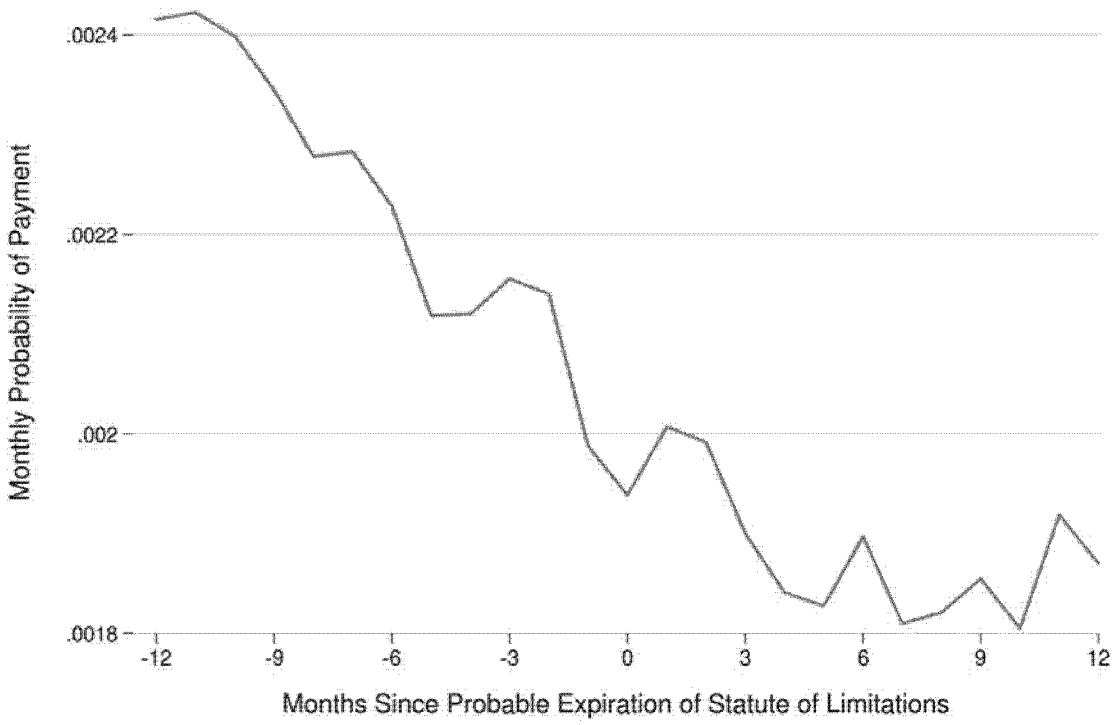
[649] Debts in the CCP that are reported by multiple debt collectors, for instance if the debt is transferred or sold, are not explicitly linked. As in the Bureau's prior quarterly Consumer Credit Trends report on collection of telecommunication debt, tradelines were linked based on the dollar amount and opening dates associated with the tradelines. Bureau of Consumer Fin. Prot., *Quarterly Consumer Credit Trends: Telecommunication Debt Collection* (Aug. 22, 2018), *https://www.consumerfinance.gov/data-research/research-reports/quarterly-consumer-credit-trends-telecommunications-debt-collection/*. For this analysis, a tradeline was considered to be a continuation of a previous debt if it had the same original balance and it was opened on or after the latest balance date for the previous tradeline. Debt collectors do not appear to consistently report payment information when furnishing information to the nationwide CRA. As such, for this analysis, the Bureau considered a debt to have had a payment made if in any month: (1) There is a positive payment amount; (2) there is a populated last payment date, or (3) the account is marked paid in full or settled. With regard to the timing of the first payment, the Bureau's analysis used the earliest value of the last payment date for a debt, if populated, or the earliest balance data associated with a payment amount or paid-in-full flag, as appropriate. The method for determining whether a debt was ever paid is the same as is used in Charles Romeo and Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit* (Bureau of Consumer Fin. Prot., Office of Research Working Paper No. 2018–01, Feb. 12, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3124954*.

[650] The collections tradelines in the CCP are primarily medical debts, utility debts, and telecommunications debts, and it is the Bureau's understanding that the statute of limitations for written contracts is the one that would generally apply for these types of debts. Relatively few collection tradelines relate to credit card debt; the Bureau understands that this is because credit card issuers prefer to furnish information to the nationwide CRAs regarding their customers' accounts even when accounts have been charged off and placed with a debt collector.

[651] The overall level of the hazard rate in the figure is quite low—on the order of two-tenths of 1 percent. This is to be expected given the monthly nature of the series—although around 10 percent of all collections tradelines eventually show some evidence of payment, the proportion that do so in any given month is quite low.

[652] While Figure 1 is based on all collections tradelines, regardless of the type of original creditor, the pattern over time looks very similar if the calculation is done separately by type of original creditor.

[653] Alternatively, this result would also be consistent with all debt collectors currently ignoring the statute of limitations and continuing to sue or threaten to sue on time-barred debt. However, as discussed above, the Bureau understands that most debt collectors avoid suits or threats of suits on time-barred debt.



Because the available data do not permit the Bureau to identify the expiration of the statute of limitations precisely, the analysis above may fail to identify some effects. The Bureau requests data and other evidence on how the expiration of the statute of limitations affects debt collection in the current market.

5. Communication Prior To Furnishing Information

Proposed § 1006.30(a) would prohibit a debt collector from furnishing information to a CRA regarding a debt before communicating with the consumer about that debt, a requirement that a debt collector could satisfy by sending a validation notice prior to furnishing information.

Potential benefits and costs to consumers. The proposal would help ensure that consumers learn about an alleged debt before a debt collector furnishes adverse information to a CRA. When consumers believe that the information is in error, they will have an opportunity to dispute the debt.

When debt collectors furnish information about unpaid debts to CRAs, that information can appear on consumer credit reports, potentially limiting consumers' ability to obtain credit, employment, or housing. If consumers are unaware that information about a possible unpaid debt is being furnished to a CRA, then they may not realize that their ability to obtain credit, employment or housing may be affected by the debt's presence on their credit reports. They may pay more for credit or lose out on employment or housing because they are unaware that their credit scores have been negatively affected or they may discover the adverse information only when they apply for credit, employment, or housing.

To quantify the potential consumer benefits from the proposal, the Bureau would need to know: (1) How frequently consumers are unaware debt collectors had furnished information about their debts to credit bureaus but would become aware of it if the debt collectors communicated with consumers prior to furnishing data; and (2) the benefit to these consumers of becoming aware they had a debt in collections.

In many cases, consumers would not be affected by the proposed provision because many debt collectors already send validation notices before furnishing information to CRAs. Many other consumers would not be affected because debt collectors do not furnish information to CRAs for some or all debts on which they are seeking to recover.

The Bureau understands that most debt collectors mail validation notices to consumers shortly after they receive accounts for collections.[654] A minority of debt collectors sometimes or always mail validation notices only after speaking with consumers (whether contact was initiated by the debt collector or the consumer).[655] In addition, a number of debt collectors do not furnish information to CRAs, so again in these cases the proposed provision would not affect consumers. The Bureau does not have representative data to estimate how often consumers would be affected by the proposed provision, but the evidence suggests that a relatively small share of debt collectors furnish information to CRAs before providing a validation notice. If this occurs in 5 percent of cases, for example, it could result in approximately 7 million additional validation notices sent each year (assuming that no debt collectors would cease credit reporting in response to the proposed provision).[656]

Learning that a debt is in collections shortly after the collections process begins can help consumers prevent or mitigate harm from adverse information on their credit reports. It can be particularly important if the information

[654] *See* CFPB Debt Collection Operations Study, *supra* note 45, at 28.

[655] In the Bureau's Operations Study, 53 of 58 respondents said that they send a validation notice shortly after debt placement, and of those that do not, three respondents that said that they furnish data to CRAs. CFPB Debt Collection Operations Study, *supra* note 45, at 28. During the meeting of the Small Business Review Panel, only one small entity representative described additional burdens it would face as a result of a requirement to communicate with consumers before furnishing information to credit bureaus.

[656] This estimate assumes 140 million validation notices are sent each year, based on an estimated 49 million consumers contacted by debt collectors each year and an assumption that each receives notices about an average of approximately 2.8 notices during the year.

about the debt is inaccurate because in those cases consumers who learn of the alleged debt can dispute the item under the FCRA. By informing consumers about the collection item before it is furnished to a CRA, the proposal would make it less likely that consumers learn about a collection item when they are in the process of applying for credit or other benefits, at which point they may feel pressure to resolve the item and may not have the opportunity to fully dispute the item.

An FTC report addressed the prevalence of collections-related errors in credit reports.[657] The FTC report analyzed data from a sample of 1,001 consumers and identified errors in the credit records of three nationwide CRAs. The report found collections-related errors in 4.9 percent of credit reports, and credit reports with documented errors contained, on average, 1.8 errors per report. The Bureau's Debt Collection Consumer Survey also suggests that debt collectors made collection errors, finding that 53 percent of consumers who said they had been contacted about one or more debts in collection said that these contacts included at least one debt the consumer thought was in error.[658]

Credit scores are based on a wide variety of information in consumer credit files. While many errors have only small effects on consumers' credit scores,[659] in some cases information in credit files about unpaid debts can have a reasonably large impact on credit scores. For example, analysis of telecommunications collection items in credit reports has shown that, while additional collection items have relatively small effects in some cases, it can have substantial effects for some consumers, with an average reduction in credit score of more than 41 points for super-prime consumers.[660] In some circumstances, these changes could lead to higher interest rates for consumers or denial of credit, in particular for borrowers with otherwise high credit scores.

Potential benefits and costs to covered persons. The proposal would affect the practices of debt collectors who sometimes furnish information about consumers' debts to CRAs before the debt collectors have communicated with consumers. The Bureau understands that most debt collectors mail validation notices to consumers shortly after they receive the accounts for collections and before they furnish data on those accounts, and so they already would be in compliance with the proposed requirement.[661] Forty-five out of 58 debt collectors responding to the Bureau's Operations Survey said that they furnish information to credit bureaus.[662] Of these respondents, all but three said that they send a validation notice upon account placement, such that the proposed requirement would be satisfied. These debt collectors likely would need to review their policies to ensure that validation notices always are sent (or validation information is provided in an initial communication) prior to reporting on accounts, which the Bureau expects would involve a small one-time cost. Other debt collectors do not furnish information at all to CRAs and so would not be affected by the proposed requirement.

Debt collectors who furnish information to CRAs but provide validation notices to consumers only after they have been in contact with consumers would need to change their practices and would face increased costs as a result of the proposal. Because these debt collectors are already required to provide validation notices to consumers (unless validation information is provided in an initial communication), the Bureau expects that they already have systems in place for sending notices and would not face one-time compliance costs greater than those of other debt collectors. However, debt collectors would face ongoing costs from sending validation notices to more consumers than they would otherwise, at an estimated cost of $0.50 to $0.80 per debt if sent by postal mail.[663] To the extent debt collectors take advantage of opportunities to send validation notices electronically, an option the proposal elsewhere seeks to make more viable, the marginal cost of sending each notice is likely to be approximately zero. Alternatively, these debt collectors could cease furnishing information to CRAs, which could impact the effectiveness of their collection efforts.[664] Because debt collectors could choose the less burdensome of these options, the additional costs of delivering notices represent an upper bound on the burden of the provision for debt collectors.

The Bureau requests data and other information about the benefits and costs to consumers and covered persons of the proposed requirement. In particular, the Bureau requests information that would help the Bureau to estimate the number of consumers affected by the proposed provision, the benefits for these consumers, and the potential costs to covered persons of complying with the proposed provision.

6. Prohibition on the Sale or Transfer of Certain Debts

Proposed § 1006.30(b)(1) would prohibit a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that the debt was paid or settled, the debt was discharged in bankruptcy, or an identity theft report was filed with respect to the debt. Proposed § 1006.30(b)(2) would create several exceptions to this prohibition.

The Bureau understands, based on its market knowledge and outreach to debt collectors, that debt collectors generally do not sell, transfer, or place for collections debts (other than in circumstances covered in the exceptions) if they have reason to believe the debts cannot be validly collected because they have been paid, they were settled in bankruptcy, or an identity theft report was filed with respect to them.[665] Therefore, the Bureau expects the benefits and costs of this provision to be minimal.

7. Notice for Validation of Debts

Proposed § 1006.34 would implement and interpret FDCPA section 809(a), (b), (d), and (e). Specifically, proposed § 1006.34(a) provides that, subject to certain exceptions, a debt collector must provide a consumer the validation information described in § 1006.34(c). Proposed § 1006.34(c) would implement FDCPA section 809(a)'s content

[657] Fed. Trade Comm'n, *Report to Congress under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* (2012).

[658] CFPB Debt Collection Consumer Survey, *supra* note 18, at 24.

[659] *See* Fed. Trade Comm'n, *Report to Congress under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* at 43 (2012).

[660] *See* Brian Bucks et al., *Collection of Telecommunication Debt,* Bureau of Consumer Fin. Prot. (Aug. 2018).

[661] In the Operations Survey, 53 of 58 respondents said that they send a validation notice shortly after debt placement. CFPB Debt Collection Operations Study, *supra* note 45, at 28.

[662] *Id.* at 19.

[663] *See* CFPB Debt Collection Operations Study, *supra* note 45, at 32–33. One small entity representative on the Bureau's Small Business Review Panel indicated that, for about one-half of its accounts, it currently sends validation notices only after speaking with a consumer, and that, if it were required to send validation notices to all consumers, it would incur additional mailing costs of $0.63 per mailing for an estimated 400,000 accounts per year.

[664] If debt collectors furnish information to CRAs less frequently this could make consumer reports less informative in general, which could have negative effects on the credit system by making it harder for creditors to assess credit risk.

[665] With respect to debts subject to an identity theft report, FCRA section 615(f) already prohibits a debt collector from selling, transferring for consideration, or placing for collection debts if the debt collector has been notified by a consumer reporting agency that the debt resulted from identity theft.

requirements and require that the validation notice include certain information about the debt and the consumer's protections with respect to debt collection that debt collectors do not currently provide on validation notices. Proposed § 1006.34(d) would set forth general formatting requirements and permit debt collectors to comply with these requirements by using the proposed model validation notice in appendix B. Proposed § 1006.34(e) would permit, but not require, debt collectors to provide a consumer the validation notice translated into any language, if the debt collector also sends an English-language validation notice.

Potential benefits and costs to consumers. The proposed validation information may benefit consumers in four ways. First, the disclosures would provide more information about the debt, which may help consumers determine whether the debt is theirs and whether the reported amount owed is accurate. Second, the notice would provide a plain-language disclosure of the consumer's rights in debt collection, in particular the right to dispute, which should help consumers to know their rights and be able to exercise them. Third, the validation information would include consumer response information that should make it easier for consumers to take certain actions, including disputing a debt. Finally, the proposed model validation notice form is intended to provide information to consumers in a more appealing and easy-to-read format, making it more likely that consumers read and comprehend the information than with the validation notices currently in use.

To quantify the benefit of providing more and clearer validation information, the Bureau would need to estimate the impact of this additional information on consumers' ability to recognize their debts compared to what is currently provided on validation notices, as well as how consumers would respond to that additional information. Although the Bureau is not aware of data that would permit a full accounting of these benefits, below is a summary of information the Bureau is aware of that is relevant to some factors affecting these benefits.

The Bureau understands that, in general, validation notices currently include little or no information about the debt beyond the information specifically listed in section 809(a) of the FDCPA (*i.e.,* the current amount of the debt and the name of the current creditor). This information may not be sufficient for the consumer to recognize the debt, particularly if: (1) The amount owed has changed over time due to interest, fees, payments, or credits; (2) the debt collector has changed since an original collection attempt; or (3) the creditor's name is not one the consumer associates with the debt (as with some store-branded credit cards issued by third-party financial institutions). Consumers who do not recognize a debt because the information on a validation notice is insufficient may incur costs if they mistakenly dispute a debt they owe, pay a debt they do not owe, or ignore a debt on the assumption that the collection attempt is in error.

Relative to current validation notices, the proposed validation information would include more specific details about the debt, such as the debt's account number and an itemization of the debt. The Bureau believes this information would benefit consumers by making it easier for them to determine whether they owe a debt and, therefore, reducing the likelihood of incurring costs due to mistakes like those noted above. The consumer can also use the consumer response information to request the name and address of the original creditor, which may further help the consumer to recognize the debt.

To fully evaluate the benefits to consumers of disclosing additional information, the Bureau would need representative data to estimate how often consumers would read and understand the additional information on the notice and the extent to which that information increases consumer recognition and understanding compared to a notice without it. For example, the Bureau could further quantify some of the consumer benefits of the notice if the Bureau were able to estimate: (1) How many consumers ignore notices out of a mistaken conclusion that the debt is not theirs; (2) how many consumers dispute correct debts, and subsequently, how much time the proposed validation notice would save by obviating later interactions that result from improper disputes; and (3) how many consumers fail to dispute or make payments on incorrect debts. The Bureau is not aware of a source of information on the number of consumers in these categories or the possible time savings that could result from the proposed validation information. As discussed in the section-by-section analysis in part V, the Bureau currently is conducting additional consumer testing of possible time-barred debt and revival disclosures. This testing may also provide additional evidence about the benefits of the proposed validation information to consumers.

The Bureau's Debt Collection Consumer Survey suggests that the proposed validation information would likely be helpful in recognizing a debt. Specifically, when asked how helpful various pieces of information would be in figuring out whether they owed a debt, consumers were most likely to indicate that the creditor name, type of debt, and an itemization of the amount owed (such as principal, interest, and fees) were especially valuable. These opinions were echoed in focus groups in which consumers noted that after a debt is sold it is more difficult to recognize, and that they wanted as much information as possible to help them recognize the debt as theirs (especially the account number, creditor, and amount due) with the exception of sensitive information like social security numbers.[666]

To quantify the benefits of the proposed provision requiring a clear and conspicuous disclosure of a consumer's right to dispute a debt, the Bureau would need to estimate the number of consumers who fail to dispute debts that they do not owe because they are unaware of, or do not comprehend, their right to dispute. The Bureau cannot precisely quantify this benefit; however, the discussion below identifies several applicable considerations and estimates.

The Bureau estimates that at least 49 million consumers are contacted by debt collectors each year.[667] Twenty-eight percent of consumers who said they had been contacted about one or more debts in collection reported that the contacts included attempts to collect at least one debt that the consumers believed they did not owe.[668] One-third of consumers who had been contacted said the amount the creditor or debt collector was trying to collect was wrong for at least one of these debts, and 16 percent said the contacts included at least one contact about a debt that was instead owed by a family member. Taken together, more than one-half of the consumers (53 percent) who said they had been contacted about one or more debts in collection reported that they thought at least one of the debts they

[666] FMG Focus Group Report, *supra* note 38, at 15–16.

[667] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 13, 40–41.

[668] The survey questions concerning consumer beliefs about errors in collections did not ask respondents to distinguish between debts owed to a debt collector and debts owed to a creditor. If consumers are more or less likely to believe there is an error for collection attempts by debt collectors, then this percentage and those below may over- or under-estimate the likelihood that a consumer believes a debt is in error when contacted by a debt collector.

were contacted about was in error. This suggests that there are many consumers who receive the validation notices in use today who might be likely to dispute based on their perception that either the debt is not theirs or is wrong.

Among the 53 percent of consumers who cited one of the issues noted above, 42 percent reported that they disputed a collection in the prior year, and 11 percent of consumers who had not cited one of those issues indicated that they had disputed a debt. The fact that less than one-half of the consumers who questioned a debt about which the creditor or collector contacted them reported disputing a debt is consistent with the possibility that some consumers do not dispute in response to a collection effort because they are not aware of the option to dispute or do not understand the steps required to do so. The proposed clear and conspicuous statement of the dispute right could benefit consumers by making salient the possibility of dispute.

The survey's finding that only 42 percent of consumers who thought they experienced an error with a debt in collection disputed the error suggests consumers are uncertain about how to dispute a debt in collection or that they believe that disputes require too much time and effort relative to the expected benefit. The consumer response information could reduce these impediments to disputing debts that consumers believe are in error. Specifically, the consumer response information would provide a clear means of disputing a debt in a way that triggers the protections provided by the FDCPA and this proposed rule, if finalized. Furthermore, the convenience of the consumer response information could reduce barriers to responding by eliminating or reducing the burden of, for example, deciding what information is relevant and how to phrase the response.[669] This could allow some consumers to save time and avoid other negative consequences, such as lower credit scores due to a debt they may not owe being listed as unpaid in their credit files.

Additionally, the consumer response information includes an option to request information about the original creditor. This additional information may help consumers in determining whether the debt is theirs.

The Bureau has proposed a model validation notice. Several considerations went into the content and design of the model validation notice. First, consumers must have relevant and accurate information to make informed decisions on how to act with regard to the debt; therefore the Bureau conducted consumer testing to identify what pieces of information consumers considered to be important to help them identify whether a debt was theirs, whether the amount stated was correct, and how the amount the debt collector was attempting to collect has changed over time (*e.g.,* due to fees, interest, and payments).[670] However, there is some indication that consumers tend to not read certain types of standard-form disclosures.[671] To try to avoid this result, the Bureau conducted consumer testing exploring how consumers interacted and engaged with the notice and the pieces of information contained therein.[672] This helped the Bureau understand whether consumers were inclined to engage with the document in general, and which pieces of the validation notice received more or less consumer attention.

The Bureau incorporated the findings from this consumer testing in its design of the proposed model validation notice form. To increase both engagement and comprehension of the validation information, the Bureau designed the proposed form to be visually engaging. The proposed form uses plain language wherever possible and conforms to recommendations the SEC set forth in their plain English handbook.[673] To reduce the perceived complexity of the information, the proposed form uses a clear hierarchy of information through positioning in a columnar format, varying type-size, and bold-faced type for subsection headings. It uses shading to highlight the amount due and uses plain language rather than technical terms. Usability testing research using eye-tracking suggests that participants were able to locate relevant information on the proposed form, with most participants able to quickly locate their account number and the contact information of the creditor.[674] The information presented in the proposed form is also concise, presenting consumers with a manageable amount of information about the debt and what they can do in response to the notice. This is important, as the perceived cost to a consumer of reading a disclosure increases with the amount of information provided.[675]

The Bureau expects consumers to experience few costs as a result of the proposed provision.

Potential benefits to covered persons. The proposed provision would significantly reduce the litigation risk that debt collectors face when mailing validation notices. This would benefit debt collectors directly, by reducing litigation costs related to validation notices. It could also indirectly benefit debt collectors by adding information to validation notices that would be helpful to debt collectors and consumers but which debt collectors currently do not include for fear that it would increase litigation risk. The proposed validation information may also make consumers more likely to dispute, which could increase costs for debt collectors, as discussed under ''Potential costs to covered persons'' below.

The Bureau understands that debt collectors currently face litigation risk associated with the validation notices they send, reflecting, in part, conflicting court decisions about what language is required and what language is permitted in the notices.[676] The proposal would reduce this risk for debt collectors who use the proposed model form.

The proposed validation information would include specific information about the debt intended to help consumers identify the debt and understand the amount the debt collector claims is owed. The Bureau's qualitative consumer research and the

[669] A 2016 research report by the United Kingdom's Financial Conduct Authority showed that, in a large randomized control trial, a tear off form (with a text or email reminder) led to more consumers switching from a current savings account to one with a better interest rate relative to getting only an informational text and/or email reminder and relative to an informational box with instructions on how to switch. Paul Adams et al., *Attention, Search and Switching: Evidence on Mandated Disclosure from the Savings Market,* (UK Fin. Conduct Authority, Occasional Paper No. 19 2016). *https://www.fca.org.uk/publication/occasional-papers/occasional-paper-19.pdf.*

[670] FMG Summary Report, *supra* note 42.

[671] *See, e.g.,* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law,* 66 Stan. L. Rev. 545 (2014); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts,* 43 J.Legal Studies 1, 1–35 (2014); George R. Milne & Mary J. Culnan, *Strategies for Reducing Online Privacy Risks: Why Consumers Read (or Don't Read) Online Privacy Notices,* 18 J. Interactive Mktg. 3, 15–29 (2004); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services,* (York U., draft version, 2018), *http://dx.doi.org/10.2139/ssrn.2757465.*

[672] FMG Cognitive Report, supra note 40.

[673] *See* Sec. Exchange Comm'n, *A Plain English Handbook* (Aug. 1998), *https://www.sec.gov/pdf/handbook.pdf.*

[674] FMG Summary Report, *supra* note 42.

[675] The idea that consumers may decrease their engagement with information when more information is provided is somewhat supported by research on ''choice overload.'' This work indicates that if choice sets are large, some people opt to make no choice at all. *See, e.g.,* Sheena Iyengar et al., *How Much Choice is Too Much? Contributions to 401(k) Retirement Plans, in Pension Design and Structure: New Lessons from Behavioral Finance,* at 83 (Oxford U. Press 2004).

[676] *See* Small Business Review Panel Report, *supra* note 57, at 22.

Bureau's complaint data suggest that the information currently included in validation notices is often not sufficient for consumers to identify a debt or whether the amount owed is correct.[677] If consumers are better able to identify debts, they may be less likely to dispute or ignore a debt that they in fact owe, and at the same time may be better able to articulate the basis for a dispute of a debt that they do not owe. These effects could benefit debt collectors by reducing the costs associated with consumer disputes. Although it is possible that debt collectors could currently provide such information on validation notices, the Bureau understands that some debt collectors who would like to provide additional information do not do so largely due to the legal risks associated with including information in the validation notice beyond what is expressly listed in the FDCPA.[678] The proposal would significantly reduce this legal risk.

To quantify the benefits of this provision to covered persons, the Bureau would need data on how frequently consumers do not recognize the debt or amount owed identified in a validation notice, how many consumers would better recognize the debt given the proposed information, and how consumers would act on that information. While the Bureau is not aware of available data that would permit it to estimate these numbers, the Debt Collection Consumer Survey does provide some basis for thinking that the proposed validation information would be helpful to consumers.

The proposed validation information could reduce debt collector costs associated with disputes by preventing some disputes from consumers who are more likely to recognize that they owe a debt and by making disputes that debt collectors receive clearer and easier to resolve. Debt collectors report that processing disputes is a costly activity, and that it can be especially difficult to process disputes if the consumer provides little or no detail about the basis for a dispute. Debt collectors surveyed by the Bureau indicated that most disputes took between five minutes and one hour of staff time to resolve, with 15 to 30 minutes being the most common amount of time.[679] Respondents said that disputes took the longest amount of time to resolve if the basis of the dispute was unclear or if the consumer said the debt was not theirs.[680]

The Bureau does not have a basis to estimate how much the proposed validation information might affect dispute rates. As an illustration of potential cost savings if dispute rates fall, if the proposed information were to reduce the number of consumers who dispute by 1 percent of all validation notices sent, and assuming that there are 140 million validation notices sent per year,[681] the overall number of annual disputes would fall by 1.4 million. Assuming an average time to process each dispute of 0.375 hours, the overall savings to industry would be estimated at 525,000 person-hours, or approximately 250 full-time equivalents. Assuming labor costs for debt collectors of $22 per hour,[682] this would represent industry cost savings of about $11.5 million.

The proposed validation information could also reduce the cost of processing disputes by making it easier for consumers who dispute to provide at least some information about the basis of their disputes. This could reduce the costs to covered persons of processing disputes by making it easier for debt collectors to investigate disputed debts in order to verify the debt.

Potential costs to covered persons. Debt collectors already send validation notices to consumers to comply with the FDCPA, so the proposed validation information would generally affect the content of existing disclosures debt collectors are sending rather than require debt collectors to send entirely new disclosures. Nonetheless, debt collectors would incur certain costs to comply with the proposal. These include one-time compliance costs, the ongoing costs of obtaining the required validation information, and potentially ongoing costs of responding to a potential increase in the number of disputes.

The proposed provision would require debt collectors to reformat their validation notices to accommodate the proposed validation information requirements. The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice would be relatively small, particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors would provide an updated notice at no additional cost.[683] The Bureau understands from its outreach that many covered persons currently use vendors to provide validation notices.[684] Surveyed firms, and their vendors, told the Bureau that vendors do not typically charge an additional cost to modify an existing template (although this practice might not apply if the proposal required more extensive changes to validation notices than vendors typically make today).[685] Debt collectors and vendors would bear costs to understand the requirements of the provision and to ensure that their systems generate notices that comply with the requirements, although these costs would be mitigated somewhat by the availability of a model form.

The proposed validation information would require debt collectors to provide certain additional information about the debt, which would require that debt collectors receive and maintain certain data fields and incorporate them into the notices. The Bureau believes that the large majority of debt collectors already receive and maintain most data fields included in the proposed validation information. However, some respondents to the Debt Collection Operations Survey reported that they do not receive information from creditors about post-default interest, fees, payments, and credits.[686] These debt collectors would have to update their systems to track these fields. The Bureau understands that such system updates would be likely to cost less than $1,000 for each debt collector.[687]

If debt collectors adjust their systems to produce notices including the new validation information, the Bureau would not expect there would be an increase in the ongoing costs of printing and sending validation notices. However, there could be ongoing costs related to the validation information requirements if the required data are not always available to debt collectors. The Bureau understands that some creditors do not currently track post-default charges and credits in a way that can be readily transferred to debt collectors.

[677] See *supra* notes 451–52 and accompanying text.

[678] *See* Small Business Review Panel Report, *supra* note 57, at 22 (finding that small entities would benefit from a model notice that reduced litigation risk arising from conflicting court decisions about what information is permitted on a validation notice).

[679] CFPB Debt Collection Operations Study, *supra* note 45, at 31.

[680] *Id.*

[681] The assumption of 140 million validation notices per year is based on an estimated 49 million consumers contacted by debt collectors each year and an assumption that each consumer receives an average of approximately 2.8 notices during the year.

[682] This assumes an hourly wage of $15 and taxes, benefits, and incentives of $7 per hour. *See* CFPB Debt Collection Operations Study, *supra* note 45, at 17 (reporting estimated debt collector wages between $10 and $20 per hour plus incentives).

[683] *See id.* at 33.

[684] In the Operations Study, over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors. *Id.* at 32.

[685] *Id.* at 33

[686] In the Operations Study, 52 of 58 respondents reported receiving itemization of post-charge-off fees on at least some of their accounts. *Id.* at 23.

[687] *Id.* at 26.

Under the proposal, debt collectors would be unable to send validation notices—and therefore unable to collect—if creditors do not provide this information.[688] Some debt collectors might lose revenue as a result of not being able to collect debts if they do not obtain this information from creditors. The Bureau does not have representative data that would permit it to estimate how frequently this would occur.

Other potential costs to debt collectors could arise if changes to the validation information affect how consumers respond, particularly whether they dispute the debt. As discussed above, because the proposed validation information would include more detail, consumers might be more likely to recognize the debt and less likely to mistakenly dispute debts that they owe. On the other hand, the new consumer response information would make it easier to dispute debts or request the name and address of the original creditor. Together with the additional information about consumers' ability to dispute that would be provided, this could increase the number of consumers who dispute or request original-creditor information. The overall impact on dispute rates is unclear.

The Bureau does not believe that any increases in dispute rates would be likely to substantially reduce collection revenue, but increased dispute rates would increase debt collector costs. With respect to collections revenue, the Bureau expects that, with some fairly limited exceptions, consumers who choose to pay a debt are generally those who recognize that they owe the debt and want to pay it, and that in most cases the proposed validation information would be unlikely to cause such consumers to dispute rather than pay.[689] With respect to costs, the disclosures could lead consumers who do not recognize the debt or who believe there is a problem with the amount demanded to dispute the debt rather than ignoring it. Responding to disputes is a costly activity for debt collectors, so an increase in dispute rates would increase these costs. As discussed above, covered persons surveyed by the Bureau indicated that most disputes took between five minutes and one hour of staff time to resolve, with 15 to 30 minutes being the most common amount of time.[690]

The Bureau requests additional information about the benefits and costs to consumers and covered persons of the proposed validation information requirements, including information on whether and to what extent consumers would benefit from the requirements in the proposal, the costs to covered persons of providing the information that the proposal would require, and the likely effects of the proposal on consumer dispute rates.

Alternative proposals to require Spanish-language disclosures. The Bureau considered proposals that would require debt collectors to provide a Spanish-language translation of the validation information under certain circumstances, such as on the reverse side of any English-language validation notice or if requested by a consumer. Consumers with limited English proficiency may benefit from translations of the validation information, and Spanish speakers represent the second-largest language group in the United States after English speakers.[691]

Requiring Spanish-language disclosures would impose costs on some debt collectors. A requirement to send a Spanish-language disclosure on the back of each validation notice could increase mailing costs for all validation notices that are sent by mail, because it would require information that would otherwise be printed on the back of validation notices, such as State-mandated disclosures, to be provided on a separate page. A requirement to provide Spanish-language validation notices upon request could lead to a smaller increase in mailing costs but could require debt collectors to develop and maintain systems for tracking a consumer's language preference and responding to that preference.

The Bureau understands that some debt collectors currently send validation notices in Spanish to some consumers. To the extent sending such notices is already prevalent it would limit the consumer benefits of a proposal that required Spanish-language translations as well as the costs to debt collectors of such a proposal, although there would still be costs associated with ensuring that such disclosures were made as required by regulation.

8. Electronic Disclosures and Communications

The proposed rule includes provisions that the Bureau expects would encourage debt collectors to communicate with consumers by email and text message more frequently than they currently do. With respect to the validation notice, which most debt collectors currently provide by postal mail, proposed § 1006.42 specifies methods that debt collectors would be able to use to send notices by email or by hyperlink to a secure website in a way that complies with the FDCPA's validation notice requirements. With respect to any communications about a debt, proposed § 1006.6(d)(3) specifies procedures that debt collectors would be able to use to send an email or text message to a consumer about a debt without risking liability under the FDCPA for disclosure of the debt to a third party.

Potential benefits and costs to consumers. Today, debt collectors generally communicate with consumers by letter and telephone. If the proposal were to lead debt collectors to increase their use of emails and text messages, the proposal would benefit consumers who prefer electronic communications to letters or telephone calls.

Many consumers appear to prefer to receive certain disclosures about financial products by electronic means rather than postal mail. In 2016, of a sample of 203 million active general purpose credit card accounts, approximately 141 million accounts (69 percent of all accounts) were enrolled in online servicing, of which approximately 80 million (39 percent of all accounts) opted into delivery of periodic statements by electronic means only.[692] Because consumers who

[688] For example, the Bureau understands that after New York State began requiring itemization of post-charge-off fees and credits, some creditors were at least initially unable to provide this information and therefore did not place New York accounts for collection.

[689] While there is some evidence that consumers sometimes pay alleged debts even though they do not believe they owe them, such consumers may be motivated by factors, such as concerns about credit reporting, that are not addressed by the validation notice itself. *See* Jeff Sovern et al., *Validation and Verification Vignettes: More Results from an Empirical Study of Consumer Understanding of Debt Collection Validation Notices,* at 46–47 (St. John's U., Working Paper No. 18–0016, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219171.*

[690] CFPB Debt Collection Operations Study, *supra* note 45, at 31. The discussion in ''Benefits to covered persons'' above provides an illustration of the potential impact on debt collectors of a change in dispute rates. Using the assumptions in that illustration, if the net impact of the proposal were to increase industrywide disputes by 1 million disputes per year, it could imply increased industry costs totaling around $8.25 million per year.

[691] In 2013, 38.4 million residents in the United States aged five and older spoke Spanish at home. *See* U.S. Census Bureau, *Facts for Features: Hispanic Heritage Month 2015* (Sept. 14, 2015), *https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff18.html.*

[692] These estimates are based on data reported in Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market,* at 164–66 (Dec. 2017), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.* This rate has increased every year since at least 2013. These rates were lower for private label and retail

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experience debt collection differ from consumers who do not,[693] these estimates would be more accurate if the Bureau knew how many consumers who experience debt collection have opted into receiving electronic-only (paperless) disclosures from their creditors. It is not clear whether consumers who experience debt collection would be more or less digitally engaged with disclosures than their counterparts without debt collection experience.[694]

Other data from the Debt Collection Consumer Survey show that about 15 percent of consumers indicate that email is their most preferred method of being contacted about a debt in collection, with almost half of consumers indicating that a letter is their most preferred method, and about a quarter identifying a telephone as their most preferred method.[695] The lower percentage for email may suggest that consumers are more likely to prefer electronic communications for periodic statements and similar disclosures than for debt collection communications. Taken together, the available data suggest that a minority of consumers—between 15 and 39 percent—would prefer electronic validation notices, while a majority—as many as 69 percent—might prefer to receive electronic communications (other than the validation notice) instead of or in addition to paper communications or telephone calls.

As discussed above with respect to the proposal's provisions regarding call frequency, most consumers experiencing debt collection report that debt collectors call too often. The proposed provisions regarding electronic communications may have the indirect effect of reducing call frequency. These provisions may cause debt collectors to substitute email or text for telephone calls, and email or text may provide an easier channel for consumers to ask debt collectors to call less often. The benefits to consumers of reduced call frequency generally are discussed above. While some consumers prefer not to receive electronic communications from debt collectors, the Bureau believes that the proposal's opt-out provisions will reduce any harm to such consumers by making it relatively easy for consumers to stop attempts at electronic communication.

The risk of third-party disclosure may be different for electronic debt collection communications than for letters or telephone calls, although the Bureau is not aware of evidence that would indicate whether such risk is higher or lower. Bureau data suggests that almost two-thirds of consumers consider it very important that third parties do not hear or see a message from a creditor or debt collector.[696] To the extent that information in an electronic disclosure is less likely or more likely to be seen or heard by third parties than communications by mail or telephone, consumers receiving the validation notice electronically are likely to experience a benefit or a cost, respectively.

Receiving disclosures electronically rather than in the mail may affect the likelihood that borrowers notice and read the disclosures, which could lead to benefits or costs for consumers if they become more or less likely to inadvertently ignore or miss important information. The Bureau does not have information about how frequently consumers currently read validation notices sent by mail or how often they would read disclosures if sent by email or by hyperlink to a secure website.[697] The requirement that debt collectors provide certain details about the debt in the subject line of an email or the first line of a text message may lower the likelihood that a consumer would miss or ignore the email or text message from the debt collector transmitting the disclosure. The option of providing the disclosure on a secure website, while reducing further the risk of third-party disclosure, may also reduce the likelihood the consumer would read it because more effort is required to obtain the disclosure.

Based on available information, the Bureau does not believe that consumer comprehension of an electronic notice will be different from a paper notice. The proposal includes requirements designed to make electronic disclosures no harder to read than paper notices, including requiring that the proposed electronic disclosure resize to fit the consumer's screen. Some research suggests that shorter disclosures (*e.g.,* one to two pages), such as the proposed notice, would result in similar levels of comprehension regardless of whether they are delivered on paper or electronically.[698] In cases in which differences in performance exist between reading information on paper and electronically, the difference may be due to use of different reading strategies—people tend to scan and jump around more when reading electronic information than they do with paper.[699] Studies of other reading-based tasks (surveys, ratings, and tests or quizzes) find no differences in performance between tasks completed on paper and electronically.[700]

Potential benefits and costs to covered persons. Debt collectors who send disclosures by email or hyperlink to a secure website rather than sending letters could benefit because they would no longer have to print and mail disclosures. The Bureau estimates that the marginal cost of mailing a validation notice is approximately $0.50 to $0.80, whereas the marginal cost of sending the same communication by email

co-brand cards, suggesting that the product's use case, acquisition channel, and consumer base composition may all affect both provider practices and consumer behavior.

[693] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 15–17. Consumers who have experienced debt collection tend to have lower incomes, be under age 62, and be non-white.

[694] An FDIC survey that addressed access to banking services found that the share of respondents accessing bank accounts through online or mobile methods generally increased with income and was lower for respondents aged 65 or more. *See* 2017 FDIC National Survey of Unbanked and Underbanked Households at 27 & table 4.4 (Oct. 2018), *https://www.fdic.gov/household survey/.*

[695] CFPB Debt Collection Consumer Survey, *supra* note 18, at 23.

[696] *See* CFPB Debt Collection Consumer Survey, *supra* note 18, at 38.

[697] One debt collector who currently communicates with consumers by email reports that 60 percent of consumers open at least one email and 25 percent click a link to review their options. *See* Small Business Review Panel Report, *supra* note 57, at 7. As of 2015, about one tenth of all mass market credit card consumers accessed their online PDF periodic account statements in the final quarter of the year, which implies that fewer than one-half of consumers who receive only electronic statements viewed those statements. *See* Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market,* at 134 figure 8 (Dec. 2015). However, the Bureau does not have data about the frequency with which consumers open or otherwise access paper periodic statements. In addition, notices of debts in collection may seem more serious or important than periodic statements, and may be more likely to be opened.

[698] Some recent studies find no differences in comprehension between information displayed on paper and information displayed on computers; many of these use relatively short texts. *See, e.g.,* Robert Ball & Juan Pablo Hourcade, *Rethinking Reading for Age from Paper and Computers,* 27 Int'l J. Human-Computer Interaction 11 (2011). In contrast, many studies using longer texts find comprehension is higher for paper. *See, e.g.,* Lauren Singer & Patricia Alexander, *Reading Across Mediums: Effects of Reading Digital and Print Texts on Comprehension and Calibration,* 85 J. Experimental Educ. 1 (2017) (finding better engagement when undergraduates read from paper); Anne Mangen et al., *Reading Linear Texts on Paper Versus Computer Screen,* 58 Int'l J. Educ. Res. 61–68 (2013) (finding that a small sample of high school students had lower comprehension of electronic information relative to paper); Scott Althaus & David Tewksbury, *Agenda Setting and the ''New'' News: Patterns of Issue Importance Among Readers of the Paper and Online Versions of the New York Times,* 29 Comm. Res. 2 (2002) (randomly assigned participants to read the paper or digital version of the New York Times and found better memory for readers of the paper version).

[699] Ziming Liu, *Reading Behavior in the Digital Environment,* 61 J. Documentation 6 (2005).

[700] *See* Jan Noyes & Kate Garland, *Computer-* vs. *Paper-based Tasks: Are They Equivalent?,* 51 Ergonomics 9 (2008).

would be approximately zero. The Bureau estimates that approximately 140 million validation notices are mailed each year.[701] Assuming, for example, that 40 percent of validation notices that are currently mailed were sent by email under the proposed rule (the approximate percentage of credit card customers electing paperless disclosures), and assuming average mailing costs of $0.65, this would suggest reduced costs to industry in the range of $36 million per year. To the extent that debt collectors were to provide validation notices by email more or less frequently than this under the proposal, the cost savings would be proportionately higher or lower.

Debt collectors who use electronic communication may also benefit to the extent that some consumers are more likely to engage with debt collectors electronically than by telephone call or letter. During the SBREFA process, several small entity representatives said that communication by email or text message was preferred by some consumers and would be a more effective way to engage with them about their debts.[702] One debt collector who currently uses email to contact consumers reports that its collection rates are greater than those of traditional debt collectors. While collection rates are likely to vary according to debt collector, type of debt, and related factors, clarifying the legality of electronic communications and disclosures would make it easier for debt collectors to test the efficacy of electronic communication and use it if they find it effective, potentially lowering costs and increasing the overall effectiveness of collections.

The Bureau requests additional information about the benefits and costs to consumers and covered persons of the proposed requirements related to electronic disclosure and communication, including information on whether and to what extent consumers would benefit from the requirements in the proposal and the benefits and costs to covered persons of providing electronic communications as discussed in the proposal.

G. Potential Reduction of Access by Consumers to Consumer Financial Products and Services

This proposal contains a mix of provisions that would either restrict or encourage certain debt collection activities the net impact of which is uncertain. Economic theory indicates that it is possible for changes in debt collection rules, such as those contained in this proposal, to affect consumers' access to credit. Theory says that creditors should decide to extend credit based on the discounted expected value of the revenue stream from that extension of credit. This entails considering the possibility that the consumer will ultimately default. Specifically, the discounted expected value of an extension of credit will be the discounted present value of the stream of interest payments under the terms of the credit agreement, multiplied by the probability that the consumer pays, plus the discounted expected value of the creditor's recovery should the consumer default, times the probability of default. A profit-maximizing creditor will only extend credit to a given consumer if this expected value is positive.[703] Anything that reduces the expected value of a creditor's recovery in the event of default, in general, will lower the discounted expected value of the extension of credit as a whole. This, in turn, may make potential extensions of credit with a discounted expected only slightly above zero to become negative, such that a creditor will be less willing to extend credit. Likewise, anything that increases the expected value of a creditor's recovery increases the discounted expected value of the credit extension, and may change the sign of the expected value of potential credit extensions that had negative expected values, such that a profit-maximizing creditor will be more willing to extend credit.

There are a few ways that the proposal might increase or decrease the expected value of creditors' recovery in the event of default, although theory alone gives no indication whether any of these actual effects on recovery would be large enough to have practical significance. The safe harbor for limited-content messages and affirming the legality of email use would tend to increase the expected value of recovery, while call frequency limits may reduce the expected value of recovery. First, to the extent that the proposal would raise costs for debt collectors, debt collectors in theory could pass these costs on to creditors, whether by charging higher contingency fees to creditors or by paying lower prices to creditors when buying debt.[704] Second, the proposed rule may reduce the amount of expected recovery, either by making it less likely that consumers ultimately pay, or by reducing the amount that consumers pay in the event of a settlement. Finally, the proposed rule could increase the time it takes for debt collectors to recover. A rational creditor would discount future income more the further in the future it occurs, and so later payment of the same amount of money would reduce the discounted expected value of the payment. Alternatively, the proposed rule might lower costs for debt collectors, increase expected recovery, and decrease the time it takes for debt collectors to recover amounts owed.[705]

If the proposal were to reduce the expected value of extending credit, creditors might respond in three ways: (1) Increase their standards for lending, with an aim of reducing the probability of default; (2) reduce the amount of credit offered, thus reducing their losses in the event of a default; or (3) increase interest rates or other costs of credit such as fees, thus increasing their revenue from consumers who do not default. Which of these mechanisms any given creditor would pursue with respect to any given credit transaction would depend on the specifics of the particular credit market.

The Bureau is aware of three empirical academic studies using modern data and methods that estimate the magnitude of the effect of debt collection restrictions on access to credit,[706] one by a researcher affiliated

[701] The assumption of 140 million validation notices per year is based on an estimated 49 million consumers contacted by debt collectors each year and an assumption that each receives an average of approximately 2.8 notices during the year.

[702] *See, e.g.,* Small Business Review Panel Report, *supra* note 57, at appendix A.

[703] For purposes of this discussion, the Bureau ignores risk preferences and assumes that creditors are risk neutral. That is, while a risk-averse decision maker would prefer a certain payment of $100 to an uncertain investment with expected value of $100, the discussion in this section assumes creditors are indifferent between these options. Creditors may be risk averse to some degree, such that they would prefer the certain investment to the gamble, or even risk seeking, such that they prefer a gamble with the prospect of a higher return. The theoretical argument described here does not hinge on creditors' risk preferences—the Bureau makes this assumption solely for ease of exposition.

[704] The degree of this pass-through depends on the relative degree of market power held by debt collectors and creditors. If creditors have more market power, debt collectors will have limited ability to demand higher fees or lower wholesale prices. Given that many comments on the Small Business Review Panel Outline indicated that debt collectors have little market power in their interactions with creditors, it is likely that there is little pass-through of additional costs. *See, e.g.,* Small Business Review Panel Report, *supra* note 57, at 16–17.

[705] Because creditors are generally not subject to the FDCPA, creditors could also respond to changes to debt collection rules by changing their decisions about whether to use third-party debt collectors or to collect debts themselves. The option to move debt collection activities ''in house'' could reduce any impact of the proposal on the costs of recovering unpaid debts.

[706] In addition, earlier empirical research examined the relationship between restrictions on creditor remedies and the supply of credit. *See*

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with the Federal Reserve Bank of Philadelphia (Fedaseyeu Study),[707] another by researchers at the Federal Reserve Bank of New York (Fonseca Study),[708] and a third by researchers at the Bureau (Romeo-Sandler Study).[709] All three studies use changes in State or local debt collection laws and regulations to examine the effect of those laws on measures of credit access.

The Fedaseyeu Study used aggregate data on new credit card accounts combined with credit union call report data to examine the effect of various State law changes between 1999 and 2012 on the number of new revolving lines of credit opened each year in each State. This study finds that an additional restriction on debt collectors decreases the number of new accounts by about two accounts per quarter per 1,000 consumers residing in a State. For comparison, the data used for the Fedaseyeu Study showed an average of 120 new accounts per quarter per 1,000 consumers. The Fedaseyeu Study finds no effect of debt collection laws on the average credit card interest rate.[710] However, the Fedaseyeu Study has some important limitations, particularly regarding extrapolating its results to the effects of the proposed rule. Most importantly, it considers a wide variety of types of debt collection laws, including provisions with limited consumer protection aspects. Specifically, a majority of the debt collection law changes included in the Fedaseyeu Study largely involve changes to licensing fees, bonds, or levels of statutory penalties for violations, rather than prohibiting or requiring specific conduct, and each such change is given the same weight as a law governing conduct.[711] Leaving aside the question of whether monetary adjustments under State law are of a comparable magnitude to the proposed regulations under Federal law, the proposed rule focuses on conduct, rather than State licensing fees, bonds, or penalty amounts. As such, the results of the Fedaseyeu Study are less informative as to the effects of the proposed rule than they would be if the legal changes at issue were more comparable. The data analysis in the Fedaseyeu Study is also somewhat limited by the data that were available. The aggregate data used make it difficult to control for confounding factors, such as differences in credit scores between consumers.

The Fonseca Study follows a similar design as the Fedaseyeu Study and examines the same set of State law changes, but it employs microdata from the Federal Reserve Bank of New York's Consumer Credit Panel, a nationally representative sample of credit records from Equifax. The main results of the Fonseca Study focus on the initial loan amounts or limits for automobile loans, credit cards, and non-traditional finance loans.[712] The study finds a moderate effect on automobile loan amounts, and a small effect on initial credit card limits. Like the Fedaseyeu Study, a major limitation of the Fonseca Study is its focus on licensing requirements, which are not directly comparable to the provisions in the proposal. That the Fonseca Study finds larger effects on automobile loans than credit cards also raises questions. Although third-party debt collectors are sometimes involved in collecting on automobile loans when the loan balance exceeds the value of the car, most delinquent automobile debt is resolved through repossession. The fact that the Fonseca Study nonetheless found a moderately large effect on automobile balances suggests that possibly the study's methodology was not successful in isolating the causal effect of the debt collection laws, but instead was picking up other, unrelated, factors.

The Romeo-Sandler Study uses microdata from two large administrative datasets: The Bureau's Consumer Credit Panel (CCP) [713] and Credit Card Database (CCDB).[714] This study focuses on four recent major changes in State or local laws and regulations that imposed additional conduct requirements on either debt buyers or on all debt collectors.[715] By focusing on the effect of changes to laws that regulate debt collector conduct, the results of the Romeo-Sandler Study are arguably more applicable to understanding the effects of the proposal, although the specific changes to State or local laws studied differ considerably from the provisions of the proposed rule.

The Romeo-Sandler Study assesses three main outcomes: The probability that a credit inquiry results in an open credit card account, the credit limit on newly opened credit card accounts, and initial interest rates on credit card accounts. As discussed above, creditors might limit any of these factors to adjust for the effects of a regulation such as the proposal. The Romeo-Sandler Study controls for individual consumers' credit scores and census tract demographic information and flexibly adjusts for State-level trends over time that might otherwise bias the estimates of an analysis. As with the Fedaseyeu Study and Fonseca Study, the Romeo-Sandler Study found effects of debt collection laws that are in the direction predicted by theory (*i.e.,* increased regulation increases the cost or decreases the availability of credit), but the effects are quite small in magnitude. Using the CCP, this study found that additional regulations on debt collectors' conduct caused the success rate of a credit inquiry to decline by less than 0.02 percentage points off a base

Thomas A. Durkin et al, Consumer Credit and the American Economy 521–525 (Oxford U. Press 2014) (summarizing this empirical literature).

[707] Viktar Fedaseyeu, *Debt Collection Agencies and the Supply of Consumer Credit* (Fed. Reserve Bank of Phila. Working Paper No. 15–23, 2015).

[708] Julia Fonseca, Katherine Strair & Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection* (Fed. Reserve Bank of N.Y. Staff Report No. 814, 2017).

[709] Charles Romeo & Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit* (Bureau of Consumer Fin. Prot., Off. of Research, Working Paper No. 2018–01, 2018.

[710] In addition to the results described here, the Fedaseyeu Study also examines the effect of debt collection laws on the number of debt collection firms per capita and a measure of the recovery rate from debt collection. The Bureau omits discussion of these results here because they are not directly relevant to the question of consumer access—the Bureau discusses potential effects on debt collection firms above.

[711] Specifically, Fedaseyeu created an index of debt collection regulation, with one point added for a tightening in any one of six categories of regulation, including licensing requirements, bonding requirements, and the creation of a board to regulate third-party debt collectors.

[712] The Fonseca Study defines non-traditional finance loans as ''retail cards, personal loans and a residual loan category.'' Like the Fedaseyeu Study, the Fonseca Study also examines the effect of the debt collection laws studied on the number of debt collectors present in each State; again, the Bureau omits discussion of those results in this section.

[713] Although similar in nature, the Bureau's CCP is not the same as the Federal Reserve Bank of New York's Consumer Credit Panel, discussed above. The Bureau's CCP is an anonymized sample of credit records from one of the three nationwide CRAs, containing a 1-in-48 representative sample of all adults with a credit record. The data contain all credit accounts (trade lines) and hard inquiries on a consumer's credit report, with a unique, anonymous identifier linking records belonging to the same consumer. This CCP does not contain any personally identifying information on individual consumers.

[714] The CCDB is a monthly panel describing balances, payments, and interest rates on all credit card accounts issued by a set of major banks, representing roughly 90 percent of the credit card market. As with the CCP, accounts are identified by an anonymous identifier, and the CCDB does not contain any personally identifying information.

[715] New laws were put into effect in North Carolina in October 2009 and California in January 2014; both of these laws focused exclusively on debt buyers. In addition, New York City, in April 2010, and New York State, in December 2014, introduced new debt collection restrictions through administrative regulations. These updated restrictions generally require debt collectors to take additional steps before collecting, including requiring additional documents to substantiate debts before collections can begin, requiring disclosures or additional documentation before lawsuits can be filed to enforce a debt, and requiring disclosures once the State's statute of limitations has run out.

rate of about 43 percent. The study concludes that one can statistically reject that the effect was as large as 0.7 percentage points. The study provides some context for these effects by comparing them to the effect of changing consumers' credit scores. The study found that each credit score point increases the probability of a successful credit inquiry for subprime borrowers by about 0.2 percentage points. Thus, the estimated effect of a debt collection law is equivalent to lowering consumers' credit scores by less than one point.[716] The Romeo-Sandler Study finds similarly small effects on credit limits, which are again equivalent to a very small change in credit score. The magnitude of the credit limit effect in the Romeo-Sandler Study is smaller than that found in the Fonseca Study.

The Romeo-Sandler Study also analyzes the effect of debt collection laws on credit card interest rates using the CCDB. The study finds that initial interest rates increase slightly following a State or local debt collection law or regulation, but that this entirely takes the form of a reduced frequency of accounts with an introductory APR of 0 percent—the level of positive initial interest rates are essentially unchanged.

The Romeo-Sandler Study is also able to shed light on potential areas of heterogeneity in the effects of State debt collection laws because of its access to rich microdata. The Romeo-Sandler Study explores the effects separately for consumers with high and low credit scores, and finds somewhat larger (although still small) effects on consumers with sub-prime credit scores. This is consistent with theory. Even within the sub-sample of consumers with sub-prime credit scores, the effect of the laws is equivalent to a three-point decrease in sub-prime borrowers' credit scores.

The studies discussed above provide evidence that regulation of debt collection can affect consumer access to credit in ways consistent with economic theory. However, these studies do not speak directly to the likely effects of the proposed rule on consumer credit markets. The State or local laws analyzed in these studies implement a different set of consumer protections than those in the proposed rule. The proposed rule includes some provisions likely to increase debt collector costs, but it also includes other provisions, such as those related to limited-content messages and email and text messages, which could lower costs for some debt collectors. In addition, creditors and debt collectors might react differently to changes in State or local collection standards than the standards in the Bureau's proposed rule, which could affect all U.S. consumers. For instance, a nationwide creditor might choose not to adjust its credit standards in response to a change in only one State's debt collection laws, but might find it optimal to change its standards if similar laws applied nationwide or to a large share of its potential borrowers.

H. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

Depository institutions and credit unions are generally not debt collectors under the FDCPA and therefore would not be covered by the proposal. However, as noted above, creditors could experience indirect effects from the proposal to the extent they hire FDCPA-covered debt collectors or sell debt in default to such debt collectors. Such creditors could experience higher costs if debt collectors' costs increase and if debt collectors are able to pass those costs on to creditors.

The Bureau understands that many depository institutions and credit unions with $10 billion or less in total assets rely on FDCPA-covered debt collectors to collect unpaid amounts, but the Bureau does not have data indicating whether such institutions are more or less likely than other creditors to do so. The Bureau requests additional data and other information about potential benefits and costs of the proposal for these institutions.

2. Impact of the Proposed Provisions on Consumers in Rural Areas

Consumers in rural areas may experience benefits from the proposed rule that are different in certain respects from the benefits experienced by consumers in general. For example, consumers in rural areas may be more likely to borrow from small local banks and credit unions that may be less likely to outsource debt collection to FDCPA-covered debt collectors. Debts owed by consumers in rural areas may also be more likely to be collected by smaller debt collectors, which the Bureau understands are less likely to attempt debt collection calls more frequently than the proposed frequency caps would permit. The proposed frequency caps may therefore have less of an impact on consumers in rural areas.

The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results, and other factual information on the impact of the proposed rule on consumers in rural areas.

I. Request for Information

The Bureau will further consider the benefits, costs, and impacts of the proposed provisions and additional proposed modifications before finalizing the proposal. As noted above, there are a number of areas in which additional information would allow the Bureau to better estimate the benefits, costs, and impacts of this proposal and more fully inform the rulemaking. The Bureau asks interested parties to provide comment or data on various aspects of the proposed rule, as detailed in the section-by-section analysis. Information provided by interested parties regarding these and other aspects of the proposed rule may be considered in the analysis of the benefits, costs, and impacts of the final rule. The Bureau specifically requests precise cost or operational data that would permit it to better evaluate the potential impacts on consumers and covered persons, including impacts on collection rates, implementation costs and ongoing operational costs imposed by the proposed provisions. The Bureau also requests comment on the research referenced above, including its use of the Fedaseyeu Study, the Fonseca Study, and the Romeo-Sandler Study.

[716] The study notes, as a point of comparison, that this effect is considerably smaller than that of routine errors in credit reports. *See* Fed. Trade Comm'n, *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003,* at 43 (Dec. 2012), *https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf.*

VII. Regulatory Flexibility Analysis

Under section 603(a) of the Regulatory Flexibility Act (RFA), an initial regulatory flexibility analysis (IRFA) ''shall describe the impact of the proposed rule on small entities.'' [717] Section 603(b) of the RFA sets forth the required elements of the IRFA. Section 603(b)(1) requires a description of the reasons agency action is being considered.[718] Section 603(b)(2) requires a succinct statement of the objectives of, and the legal basis for, the proposed rule.[719] Section 603(b)(3) requires a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.[720] Section 603(b)(4) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record.[721] Section 603(b)(5) requires identifying, to the extent practicable, all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.[722] Section 603(c) requires a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.[723] Finally, section 603(d)(1) requires a description of any projected increase in the cost of credit for small entities, a description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any increase in the cost of credit for small entities (if such an increase in the cost of credit is projected), and a description of the advice and recommendations of representatives of small entities relating to the cost of credit issues.[724]

A. Description of the Reasons Why Agency Action Is Being Considered

As noted in part I, the Bureau is issuing this proposed rule to implement and interpret the FDCPA, particularly with respect to debt collection communication, disclosure, and other related practices by FDCPA-covered debt collectors, and to further the FDCPA's goals of eliminating abusive debt collection practices and ensuring that debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged.[725] The FDCPA established certain consumer protections, but interpretive questions have arisen since its passage. Some questions, including those related to communication technologies that did not exist at the time the FDCPA was enacted (such as mobile telephones, emails, and text messages), have been the subject of inconsistent court decisions, resulting in legal uncertainty and additional cost for industry and consumers. The Bureau proposes to clarify how debt collectors may employ such technologies in compliance with the FDCPA and to address other communications- and disclosure-related practices that currently pose a risk of harm to consumers, legal uncertainty to industry, or both. The Bureau also proposes that FDCPA-covered debt collectors comply with certain additional disclosure-related and record retention requirements pursuant to the Bureau's Dodd-Frank Act rulemaking authority; these proposed requirements are designed to enhance consumer understanding of the debt collection process and to promote effective and efficient enforcement and supervision of Regulation F.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

As discussed in part IV, the Bureau issues this proposal pursuant to its authority under the FDCPA and the Dodd-Frank Act. The objectives of the proposed rule are to answer certain interpretive questions that have arisen since the FDCPA's passage and to further the FDCPA's goals of eliminating abusive debt collection practices and to ensuring that debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged.[726] As the first Federal agency with authority under the FDCPA to prescribe substantive rules with respect to the collection of debts by debt collectors, the Bureau proposes to clarify by rule how debt collectors may appropriately employ newer communication technologies in compliance with the FDCPA and to address other communications-related practices that currently pose a risk of harm to consumers, legal uncertainty to industry, or both. The Bureau also proposes to clarify consumer disclosure requirements to provide clarity for both consumers and industry participants. The Bureau intends that these clarifications will help to eliminate abusive debt collection practices and ensure that debt collectors who refrain from abusive debt collection practices are not competitively disadvantaged.[727]

As amended by the Dodd-Frank Act, FDCPA section 814(d) provides that the Bureau may ''prescribe rules with respect to the collection of debts by debt collectors,'' as that term is defined in the FDCPA.[728] Section 1022(a) of the Dodd-Frank Act provides that ''[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.'' [729] ''Federal consumer financial law'' includes title X of the Dodd-Frank Act and the FDCPA. The legal basis for the proposed rule is discussed in detail in the legal authority analysis in part IV and in the section-by-section analysis in part V.

C. Description and, Where Feasible, Provision of an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

As discussed in the Small Business Review Panel Report, for the purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[730] A ''small business'' is determined by application of SBA regulations in reference to the North American Industry Classification System (NAICS) classifications and size standards.[731] Under such standards, the Small Business Review Panel (Panel) identified four categories of small entities that may be subject to the proposed provisions: Collection agencies (NAICS 561440) with $15 million or less in annual receipts, debt buyers (NAICS 522298) with $38.5 million or less in annual revenues, collection law firms (NAICS 54110) with $11 million or less in annual receipts, and servicers who acquire accounts in default. These servicers include depository institutions (NAICS 522110, 522120, and 522130) with $550 million or less in annual receipts or non-depository institutions (NAICS 522390) with $20.5 million or less in annual receipts. The Panel did not meet

[717] 5 U.S.C. 603(a).
[718] 5 U.S.C. 603(b)(1).
[719] 5 U.S.C. 603(b)(2).
[720] 5 U.S.C. 603(b)(3).
[721] 5 U.S.C. 603(b)(4).
[722] 5 U.S.C. 603(b)(5).
[723] 5 U.S.C. 603(c).
[724] 5 U.S.C. 603(d)(1).
[725] *See* 15 U.S.C. 1692(e).
[726] *See* 15 U.S.C. 1692(e).
[727] *See id.*
[728] 15 U.S.C. 1692*l*(d).
[729] 12 U.S.C. 5512(a).
[730] 5 U.S.C. 601(6).
[731] The current SBA size standards are found on SBA's website, *http://www.sba.gov/content/table-small-business-size-standards.*

with small nonprofit organizations or small government jurisdictions.[732]

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the proposed provisions:

TABLE 4—ESTIMATED NUMBER OF AFFECTED ENTITIES AND SMALL ENTITIES BY CATEGORY

Category	NAICS	Small entity threshold	Estimated total number of debt collectors within category	Estimated number of small entity debt collectors
Collection agencies ..	561440	$15.0 million in annual receipts	9,000	8,800
Debt buyers	522298	$38.5 million in annual receipts	330	300
Collection law firms ..	541110	$11.0 million in annual receipts	1,000	950
Loan servicers	522110, 522120, and 522130 (depositories); 522390 (non-depositories.	$550 million in annual receipts for depository institutions; $20.5 million or less for non-depositories.	700	200

Descriptions of the Four Categories

Collection agencies. The Census Bureau defines ''collection agencies'' (NAICS code 561440) as ''establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients.'' [733] In 2012, according to the Census Bureau, there were approximately 4,000 collection agencies with paid employees in the United States. Of these, the Bureau estimates that 3,800 collection agencies have $15.0 million or less in annual receipts and are therefore small entities.[734] Census Bureau estimates indicate that in 2012 there were also more than 5,000 collection agencies without employees, all of which are presumably small entities.

Debt buyers. Debt buyers purchase delinquent accounts and attempt to collect amounts owed, either themselves or through agents. The Bureau estimates that there are approximately 330 debt buyers in the United States, and that a substantial majority of these are small entities.[735] Many debt buyers—particularly those that are small entities—also collect debt on behalf of other debt owners.[736]

Collection law firms. The Bureau estimates that there are 1,000 law firms in the United States that either have as their principal purpose the collection of consumer debt or regularly collect consumer debt owed to others, so that the proposed rule would apply to them. The Bureau estimates that 95 percent of such law firms are small entities.[737]

Loan servicers. Loan servicers would be covered by the proposed rule if they acquire servicing of loans already in default.[738] The Bureau believes that this is most likely to occur with regard to companies that service mortgage loans or student loans. The Bureau estimates that approximately 200 such mortgage servicers may be small entities and that few, if any, student loan servicers that would be covered by the proposed rule are small.[739]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of Classes of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skills Necessary for the Preparation of the Report or Record

The proposed rule would not impose new reporting requirements, but would impose new recordkeeping and compliance requirements on small entities subject to the proposal. The proposed requirements and the costs associated with them are discussed below.

1. Recordkeeping Requirements

Proposed § 1006.100 would require FDCPA-covered debt collectors to retain evidence of compliance with Regulation F starting on the date that the debt collector begins collection activity on a debt and ending three years after: (1) The debt collector's last communication or attempted communication in connection with the collection of the debt; or (2) the debt is settled, discharged, or transferred to the debt owner or to another debt collector.

The Bureau believes that most debt collectors are already maintaining records for three or more years for legal purposes and therefore would not incur significant costs as a result of the proposal's record retention requirement. During the SBREFA process, nearly all small entity representatives stated that their current practices are already consistent with a three-year record retention requirement, and some said that they retain records for longer periods ranging from five to 10 years.[740] Some participants said, however, that

[732] Small Business Review Panel Report, *supra* note 57, at 29.

[733] As defined by the Census Bureau, collection agencies include entities that collect only commercial debt, and the proposals under consideration apply only to debt collectors of consumer debt. However, the Bureau understands that relatively few collection agencies collect only commercial debt.

[734] The Census Bureau estimates average annual receipts of $95,000 per employee for collection agencies. Given this, the Bureau assumes that all firms with fewer than 100 employees and approximately one-half of the firms with 100 to 499 employees are small entities, which implies approximately 3,800 firms.

[735] The Receivables Management Association, the largest trade group for this industry segment, states that it has approximately 300 debt buyer members and believes that 90 percent of debt buyers are current members.

[736] The Bureau understands that debt buyers are generally nondepositories that specialize in debt buying and, in some cases, debt collection. The Bureau expects that debt buyers that are not collection agencies would be classified by the Census Bureau under ''all other nondepository credit intermediation'' (NAICS Code 522298).

[737] The primary trade association for collection attorneys, the National Creditors Bar Association (NARCA), states that it has approximately 600 law firm members, 95 percent of which are small entities. The Bureau estimates that approximately 60 percent of law firms that collect debt are NARCA members and that a similar fraction of non-member law firms are small entities.

[738] The Bureau expects that loan servicers are generally classified under NAICS code 522390, ''Other Activities Related to Credit Intermediation.'' Some depository institutions (NAICS codes 522110, 522120, and 522130) also service loans for others and may be covered by the proposed rule.

[739] Based on the December 2015 Call Report data as compiled by SNL Financial (with respect to insured depositories) and December 2015 data from the Nationwide Mortgage Licensing System and Registry (with respect to non-depositories), the Bureau estimates that there are approximately 9,000 small entities engaged in mortgage servicing, of which approximately 100 service more than 5,000 loans. *See* 81 FR 72160, 72363 (Oct. 19, 2016). The Bureau's estimate is based on the assumption that all those servicing more than 5,000 loans may acquire servicing of loans when loans are in default and that at most 100 of those servicing 5,000 loans or fewer acquire servicing of loans when loans are in default.

[740] Small Business Review Panel Report, *supra* note 57, at 28.

they retain some information for a shorter period of time such as one year. Such small entities would incur additional costs for data storage and to update systems to reflect the longer storage period.

2. Compliance Requirements

The proposal contains a number of compliance requirements that would apply to FDCPA-covered debt collectors who are small entities. The anticipated costs of compliance for small entities of these requirements are discussed below.

In evaluating the potential impacts of the proposal on small entities, the Bureau takes as a baseline conduct in the debt collection markets under the current legal framework governing debt collection. This includes debt collector practices as they currently exist, responding to the requirements of the FDCPA as currently interpreted and other Federal laws as well as State statutes and rules. This baseline represents the status quo from which the impacts of this proposal will be evaluated.

The Bureau requests comment on the estimated impacts on small entities discussed below and solicits data and analysis that would supplement the quantitative estimates discussed below or provide quantitative estimates of benefits, costs, or impacts for which there are currently only qualitative discussions.

The discussion here is confined to the direct costs to small entities of complying with the requirements of the proposed rule, if finalized. Other impacts, such as the impacts of call frequency limits on debt collectors' ability to contact consumers, are discussed at length in part VI. The Bureau believes that, except where otherwise noted, the impacts discussed in part VI would apply to small entities.

(a) Prohibited Communications With Consumers

Proposed § 1006.6(b) generally would implement FDCPA section 805(a)'s prohibition on a debt collector communicating with a consumer at unusual or inconvenient times and places, with a consumer represented by an attorney, and at a consumer's place of employment. This section would also expressly prohibit attempts to make such communications, which debt collectors already must avoid given that a successful attempt would be an FDCPA violation. Proposed § 1006.14(h)(1) would interpret FDCPA section 806's prohibition on a debt collector engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt to prohibit debt collectors from communicating or attempting to communicate with consumers through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer.

Debt collectors are already prohibited from communicating with consumers at a time or place that is known or should be known to be inconvenient to the consumer. The Bureau therefore believes that many debt collectors already keep track of what consumers tell them about the times and places that they find inconvenient and avoid communicating or attempting to communicate with consumers at these times or places. Similarly, the proposed provisions regarding communication with attorneys and at the consumer's place of employment track debt collector practices that already comply with the FDCPA. The Bureau understands that many debt collectors currently employ systems and business processes designed to limit communication attempts to consumers at inconvenient times and places and that many debt collectors also use these systems and processes to prevent communications with consumers through media that consumers have told them are inconvenient. For these reasons, the Bureau does not expect that the proposed provisions would significantly impact small entities subject to the proposal.

(b) Frequency Limits for Telephone Calls and Telephone Conversations

Proposed § 1006.14(b)(1) would prohibit a debt collector from, in connection with the collection of a debt, placing telephone calls or engaging in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Proposed § 1006.14(b)(2) would provide that, subject to certain exceptions set forth in proposed § 1006.14(b)(3), a debt collector violates proposed § 1006.14(b)(1) if the debt collector places a telephone call to a person in connection with the collection of a particular debt either: (i) More than seven times within seven consecutive days; or (ii) within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. Proposed § 1006.14(b)(4) would clarify the effect of complying with the frequency limits in § 1006.14(b)(2), stating that a debt collector who does not exceed the limits complies with § 1006.14(b)(1) and FDCPA section 806(5), and does not, based on the frequency of its telephone calls, violate § 1006.14(a), FDCPA section 806, or Dodd-Frank Act sections 1031 or 1036(a)(1)(B).

The proposed provision would impose at least two categories of costs on small entities subject to the FDCPA. First, it would mean that debt collectors must track the frequency of outbound telephone calls, which would require many debt collectors to bear one-time costs to update their systems and train staff and create ongoing costs for some debt collectors. Second, for some debt collectors, the proposed provision would require a reduction in the frequency with which they place telephone calls to consumers, which could make it harder to reach consumers and delay or reduce collections revenue.

With respect to one-time implementation costs, many debt collectors would incur costs to revise their systems to incorporate the proposed call frequency limits. Such revisions could range from small updates to existing systems to the introduction of completely new systems and processes. The Bureau understands that larger debt collectors (including those that are small entities) generally already implement system limits on call frequency to comply with client contractual requirements, debt collector internal policies, and State and local laws.[741] Such debt collectors might need only to revise existing calling restrictions to ensure that existing systems comply with the limits. Larger debt collectors might also need to respond to client requests for additional reports and audit items to verify that they comply with the limits, which could require these agencies to make systems changes to alter the reports and data they produce for their clients to review.

Smaller debt collectors and debt collection law firms are less likely to have existing systems that track or limit communication frequency, and may therefore face larger costs to establish systems to do so. However, many smaller debt collectors report that they generally attempt to reach each consumer by telephone only one or two times per week and generally do not speak to a consumer more than one time per week, which suggests that their practices are already within the proposed frequency limits.[742] For such debt collectors, existing policies may be

[741] *Id.* at 26.

[742] CFPB Debt Collection Operations Study, *supra* note 45, at 29.

sufficient to ensure compliance with the proposed provision.

(c) Time-Barred Debt: Prohibiting Suits and Threats of Suit

Proposed § 1006.26(b) would prohibit a debt collector from suing or threatening to sue on a debt that the debt collector knows or should know is time-barred.

As discussed in part V, courts have held that the FDCPA prohibits suits and threats of suit on time-barred debt. In light of this, the Bureau understands that most debt collectors do not knowingly sue or threaten to sue consumers to collect time-barred debts, and therefore the Bureau does not expect this provision of the proposed rule to have a significant effect on small entities.[743]

(d) Communication Prior To Furnishing Information

Proposed § 1006.30(a) would prohibit a debt collector from furnishing information to a CRA regarding a debt before communicating with the consumer about that debt, a requirement that debt collectors could satisfy by sending a validation notice prior to furnishing information.

The proposal would affect the practices of debt collectors who sometimes furnish information about consumers' debts to CRAs before the debt collectors have communicated with consumers. The Bureau understands that most debt collectors mail validation notices to consumers shortly after they receive the accounts for collections and before they furnish data on those accounts, and so they already would be in compliance with the proposed requirement.[744] Forty-five out of 58 debt collectors responding to the Debt Collection Operations Survey said that they furnish information to credit bureaus.[745] In all but three of these cases, the respondents said that they send a validation notice upon account placement, such that the proposed requirement would be satisfied. These debt collectors would likely need to review their policies to ensure that validation notices are always sent (or validation information is provided in an initial communication) prior to reporting on the account, which the Bureau expects would involve a small one-time cost. Other debt collectors do not furnish information at all to CRAs and so would not be affected by the proposed requirement.

Debt collectors who furnish information to CRAs but provide validation notices to consumers only after they have been in contact with consumers would need to change their practices and would face increased costs as a result of the proposal. Because these debt collectors are already required to provide validation notices to consumers once they communicate with those consumers (unless validation information is provided in an initial communication or the consumer pays the debt), the Bureau expects that they already have systems in place for sending notices and would not face one-time compliance costs greater than those of other debt collectors. However, debt collectors would face ongoing costs from sending validation notices to more consumers than they would otherwise, at an estimated cost of $0.50 to $0.80 per debt if sent by postal mail.[746] To the extent debt collectors take advantage of opportunities to send validation notices electronically, an option the proposal elsewhere seeks to make more viable, the marginal cost of sending each notice is likely to be approximately zero. Alternatively, these debt collectors could cease furnishing information to CRAs, which could impact the effectiveness of their collection efforts.[747] Because debt collectors could choose the less burdensome of these options, the additional costs of delivering notices represent an upper bound on the burden of the provision on small entities.

(e) Prohibition on the Sale or Transfer of Certain Debts

Proposed § 1006.30(b)(1) would prohibit a debt collector from selling, transferring, or placing for collection a debt if the debt collector knows or should know that the debt was paid or settled, the debt was discharged in bankruptcy, or an identity theft report was filed with respect to the debt. Proposed § 1006.30(b)(2) would create several exceptions to this prohibition.

The Bureau understands, based on its market knowledge and outreach to debt collectors, that debt collectors generally do not sell, transfer, or place for collections debts (other than in circumstances covered in the exceptions) if they have reason to believe the debts cannot be validly collected because they have been paid, they were settled in bankruptcy, or an identity theft report was filed with respect to them. Therefore, the Bureau does not expect this provision to create significant compliance costs for small entities.

(f) Notice for Validation of Debts

Proposed § 1006.34 would implement and interpret FDCPA section 809(a), (b), (d), and (e). Specifically, proposed § 1006.34(a) provides that, subject to certain exceptions, a debt collector must provide a consumer the validation information described in § 1006.34(c). Proposed § 1006.34(c) would implement FDCPA section 809(a)'s content requirements and require that the validation notice include certain information about the debt and the consumer's protections with respect to debt collection that debt collectors do not currently provide on the validation notice. Proposed § 1006.34(d) would set forth general formatting requirements and permit debt collectors to comply with these requirements by using the proposed model validation notice in appendix B.

Debt collectors already send validation notices to consumers to comply with the FDCPA, so the proposed validation information would generally affect the content of existing disclosures debt collectors are already sending rather than require debt collectors to send entirely new disclosures. Nonetheless, debt collectors would incur certain costs to comply with the proposal. These include one-time compliance costs, the ongoing costs of obtaining the required validation information, and potentially ongoing costs of responding to a potential increase in the number of disputes.

The proposed provision would require debt collectors to reformat their validation notices to accommodate the proposed validation information requirements. The Bureau expects that any one-time costs to debt collectors of reformatting the validation notice would

[743] For example, small entity representatives at the meeting of the Small Business Review Panel indicated that it was standard practice in the industry not to knowingly initiate lawsuits to collect time-barred debt. *See* Small Business Review Panel Report, *supra* note 57, at 35. Some industry groups have adopted policies requiring members to refrain from suing or threatening to sue on time-barred debts. *See, e.g.,* Receivables Mgmt. Ass'n, *Receivables Management Certification Program,* at 32 (Jan. 19, 2018), *https://rmassociation.org/wp-content/uploads/2018/02/Certification-Policy-version-6.0–FINAL-20180119.pdf.*

[744] In the Operations Study, 53 of 58 respondents said that they send a validation notice shortly after account placement. CFPB Debt Collection Operations Study, *supra* note 45, at 28.

[745] *Id.* at 19.

[746] One small entity representative on the Bureau's Small Business Review Panel indicated that, for about one-half of its debts, it sends validation notices only after speaking with a consumer and that, if it were required to send validation notices to all consumers, it would incur mailing costs of $0.63 per mailing for an estimated 400,000 accounts per year.

[747] If debt collectors furnish to credit reporting agencies less frequently this could make consumer reports less informative in general, which could have negative effects on the credit system by making it harder for creditors to assess credit risk.

be relatively small, particularly for debt collectors who rely on vendors, because the Bureau expects that most vendors would provide an updated notice at no additional cost.[748] The Bureau understands from its outreach that many debt collectors currently use vendors to provide validation notices.[749] Surveyed firms, and their vendors, told the Bureau that vendors do not typically charge an additional cost to modify an existing template (although this practice might not apply if the proposal required more extensive changes to validation notices than vendors typically make today).[750] Debt collectors and vendors would bear costs to understand the requirements of the proposed provision and to ensure that their systems generate notices that comply with the requirement, although these costs would be mitigated somewhat by the availability of a model form.

The proposed validation information requires debt collectors to provide certain additional information about the debt, which would require that debt collectors receive and maintain certain data fields and incorporate them into the notices. The Bureau believes that the large majority of debt collectors already receive and maintain most data fields included in the proposed validation information. However, some respondents to the Operations Survey reported that they do not receive from creditors information on post-default interest, fees, payments, and credits.[751] These debt collectors would have to update their systems to track these fields. The Bureau understands that such system updates would be likely to cost less than $1,000 for each debt collector.[752]

If debt collectors adjust their systems to produce notices including the new validation information, the Bureau would not expect there would be an increase in the ongoing costs of printing and sending validation notices. However, there could be ongoing costs related to the validation information requirements if the required data are not always available to debt collectors. The Bureau understands that some creditors do not currently track post-default charges and credits in a way that can be readily transferred to debt collectors. Under the proposal, debt collectors would be unable to send validation notices—and therefore unable to collect—if creditors do not provide this information.[753] Some debt collectors might lose revenue as a result of not being able to collect debts if they do not obtain this information from creditors. The Bureau does not have representative data that would permit it to estimate how frequently this would occur.

(g) Electronic Disclosures and Communications

The proposed rule includes provisions that the Bureau expects would encourage debt collectors to communicate with consumers by email and text message more frequently than they currently do. With respect to the validation notice, which most debt collectors currently provide by postal mail, proposed § 1006.42 specifies methods that debt collectors would be able to use to send notices by email or by hyperlink to a secure website in a way that complies with the FDCPA's validation notice requirements. With respect to any communications about a debt, proposed § 1006.6(d)(3) specifies procedures that debt collectors would be able to use to send an email or text message to a consumer about a debt without risking liability under the FDCPA for disclosure of the debt to a third party.

The Bureau understands that few debt collectors currently communicate with consumers using electronic means. For debt collectors who do communicate with consumers electronically, the proposal would require them to provide a method for opting out of such communications and, if providing required disclosures electronically, to provide certain information about the account in the subject line. The Bureau understands that these requirements are common features of services that provide the ability to send email to consumers. The Bureau therefore does not anticipate that these requirements would impose significant costs on small entities that choose to communicate with consumers using electronic means.

E. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

Certain other Federal laws and regulations include requirements that apply to FDCPA-covered debt collectors, as described below. However, consistent with the findings of the Small Business Review Panel, the Bureau is not aware of any other Federal regulations that currently duplicate, overlap, or conflict with the proposed rule.

For example, the Bureau's Mortgage Rules under the Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA) include communication requirements and policies and procedures applicable to mortgage servicers, some of whom may also be subject to the FDCPA. As a result, when the Bureau issued the 2016 Servicing Final Rule, the Bureau concurrently issued an FDCPA interpretive rule to clarify the interaction of the FDCPA and specified mortgage servicing rules in Regulations X and Z.[754]

The Fair Credit Reporting Act (FCRA) also includes certain provisions that apply to debt collectors, including a provision that prohibits any person from selling, transferring for consideration, or placing for collection a debt that the person has been notified resulted from identity theft.[755]

Some Federal laws implemented by other government agencies also include protections and requirements that may apply to debt collection activities. For example, the Telephone Consumer Protection Act (TCPA),[756] which is implemented by the Federal Communications Commission (FCC), affects some debt collection activities by restricting the use of automatic telephone dialing systems and artificial or prerecorded voice messages.[757] In addition, the Servicemembers Civil Relief Act (SCRA) [758] provides certain protections from civil actions against servicemembers in active duty. The SCRA restricts or limits actions against these personnel in a variety of areas related to financial management, including rental agreements, security deposits, evictions, credit card interest rates, judicial proceedings, and income tax payments.[759]

The Bureau requests comment on the intersection between the proposed rule and other Federal laws and regulations. The Bureau specifically requests

[748] *See* CFPB Debt Collection Operations Study, *supra* note 45, at 33.

[749] In the Operations Survey, over 85 percent of debt collectors surveyed by the Bureau reported using letter vendors. *Id.* at 32.

[750] *Id.* at 33.

[751] In the Operations Survey, 52 of 58 respondents reported receiving itemization of post-charge-off fees on at least some of their accounts. *Id.* at table 8.

[752] *See id.* at 26.

[753] For example, the Bureau understands that after New York began requiring itemization of post-charge-off fees and credits, some creditors were at least initially unable to provide this information and therefore did not place New York accounts for collection.

[754] See the section-by-section analysis of proposed § 1006.6(a)(5).

[755] 15 U.S.C. 1681m(f).

[756] 47 U.S.C. 227.

[757] *See ACA Int'l* v. *Fed. Commc'ns Comm'n,* 885 F.3d 687 (DC Cir. 2018).

[758] 50 U.S.C. 3901–4043.

[759] The Bureau also recognizes that other Federal regulations, including those issued by the Department of Education, may relate to debt collection. The Bureau will consult again with other Federal agencies whose regulations may be related to this rulemaking prior to issuing a final rule.

comment on conflicts that may arise between the proposed rule and other Federal laws and regulations and methods to minimize such conflicts to the extent they exist.

F. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of the Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Section 603(c) of the RFA requires the Bureau to describe in the IRFA any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.[760] In developing the proposed rule, the Bureau has considered alternative provisions and believes that none of the alternatives considered would be as effective at accomplishing the stated objectives of the FDCPA and the applicable provisions of title X of the Dodd-Frank Act while minimizing the impact of the proposed rule on small entities.

In developing the proposal, the Bureau considered a number of alternatives, including those considered as part of the SBREFA process. Many of the alternatives considered would have resulted in greater costs to small entities than would the proposal. For example, the Bureau considered limiting the frequency of contacts or contact attempts by any media, rather than by telephone calls only, and the Bureau considered requiring debt collectors to provide validation notices in Spanish under certain circumstances. Because such alternatives would result in a greater economic impact on small entities than the proposal, they are not discussed here. The Bureau also considered alternatives that might have resulted in a smaller economic impact on small entities than the proposal. Certain of these alternatives are briefly described and their impacts relative to the proposed provisions are discussed below.

*Limitations on call frequen*cy. The Bureau also considered a proposal that would have limited the number of calls permitted to any particular telephone number (*e.g.,* at most two calls to each of a consumer's landline, mobile, and work telephone numbers). The Bureau considered such a limit either instead of or in addition to an overall limit on the frequency of telephone calls to one consumer. Such an alternative could potentially reduce the effect on debt collector calls if it permitted more calls when consumers have multiple telephone numbers. The Bureau decided to propose an aggregate approach because of concerns that a more prescriptive, per-telephone number approach could less effectively carry out the consumer protection purposes of the FDCPA—some consumers could receive (and some debt collectors could place) more telephone calls simply based on the number of telephone numbers that certain consumers happened to have (and that debt collectors happened to know about). Such an approach also could create incentives for debt collectors to, for example, place telephone calls to less convenient telephone numbers after exhausting their telephone calls to consumers' preferred numbers.

The Bureau also considered alternatives to the proposal's bright-line limit on call frequency. One alternative would be a rebuttable presumption of a violation when debt collectors call more frequently than the proposed limits, paired with a rebuttable presumption of compliance when debt collectors call less frequently. The presumptions could be rebutted based on the facts and circumstances of a particular situation. Another alternative would be to provide only a safe harbor for telephone calls below the frequency limits, with no provision for telephone calls above the frequency limits. Such an approach would provide certainty to both debt collectors and consumers about a per se permissible level of calling, but it would leave open the question of how many telephone calls is too many under the FDCPA and the Dodd-Frank Act. The Bureau decided not to propose such an approach because it appears that it would not provide the clarity that debt collectors and consumers have sought, nor would it appear to provide the same degree of consumer protection as a per se prohibition against telephone calls in excess of a specified frequency. However, the proposal solicits comment on these and other alternatives.

G. Discussion of Impact on Cost of Credit for Small Entities

Section 603(d) of the RFA requires the Bureau to consult with small entities regarding the potential impact of the proposed rule on the cost of credit for small entities and related matters.[761] To satisfy these statutory requirements, the Bureau provided notification to the Chief Counsel for Advocacy of the Small Business Administration (Chief Counsel) that the Bureau would collect the advice and recommendations of the same small entity representatives identified in consultation with the Chief Counsel through the SBREFA process concerning any projected impact and the proposed rule on the cost of credit for small entities. The Bureau sought to collect the advice and recommendations of the small entity representatives during the Small Business Review Panel meeting regarding the potential impact on the cost of business credit because, as small debt collectors with credit needs, the small entity representatives could provide valuable input on any such impact related to the proposed rule.

The Bureau's Small Business Review Panel Outline asked small entity representatives to comment on how proposed provisions will affect cost of credit to small entities. The Bureau believes that the proposed rule will have little impact on the cost of credit. However, it does recognize that consumer credit may become more expensive and less available as a result of some of these provisions, although the Romeo-Sandler Study indicates that the magnitude of the cost and availability of consumer credit from recent changes to State debt collection laws is small. Many small entities affected by the proposed rule use consumer credit as a source of credit and may, therefore, see costs rise if consumer credit availability decreases. The Bureau does not expect this to be a large effect and does not anticipate measurable impact.[762]

During the SBREFA process, several small entity representatives said that the proposals under consideration at that time could have an impact on the cost of credit for them and for their small business clients. Some small entity representatives said that they use lines of credit in their business and that regulations that raise their costs or reduce their revenue could mean they are unable to meet covenants in their loan agreements, causing lenders to reduce access to capital or increase their borrowing costs.

VIII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[763] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond

[760] 5 U.S.C. 603(c).

[761] 5 U.S.C. 603(d).

[762] Charles Romeo & Ryan Sandler, *The Effect of Debt Collection Laws on Access to Credit,* (Bureau of Consumer Fin. Prot., Off. of Research, Working Paper No. 2018–01, 2018).

[763] 44 U.S.C. 3501 *et seq.*

to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the Bureau conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the information collection requirements in accordance with the PRA. This helps ensure that the public understands the Bureau's requirements or instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Bureau can properly assess the impact of collection requirements on respondents.

The proposed rule would amend 12 CFR part 1006 (Regulation F), which implements the FDCPA. The Bureau's OMB control number for Regulation F is 3170–0056. This proposed rule would revise the information collection requirements contained in Regulation F that OMB has approved under that OMB control number.

Under the proposal, the Bureau would require nine information collection requirements in Regulation F:

1. State application for exemption (current § 1006.2, proposed § 1006.108).
2. Opt-out notice for electronic communications or attempts to communicate (proposed § 1006.6(e)).
3. Communication with consumers prior to furnishing information (proposed § 1006.30(a)).
4. Validation notices (proposed § 1006.34).
5. Responses to requests for original-creditor information (proposed § 1006.38(c)).
6. Responses to disputes (proposed § 1006.38(d)(2)(ii)).
7. Subject-line information requirements when required disclosures are delivered electronically (proposed § 1006.42(b)(2)).
8. Notice and opt-out requirements for certain types of electronic delivery (proposed § 1006.42(c)(3)).
9. Record retention (proposed § 1006.100).

The first collection, the State application for an exemption, is required to obtain a benefit and its respondents are exclusively State governments. The information collected under this collection regards State law, and so no issue of confidentiality arises. The remaining collections would be to provide protection for consumers and would be mandatory. Because the Bureau does not collect any information in these remaining collections, no issue of confidentiality arises. The likely respondents would be for-profit businesses that are FDCPA-covered debt collectors, including contingency debt collection agencies, debt buyers, law firms, and loan servicers, or State governments in the case of applications under § 1006.2 (proposed § 1006.108).

The collections of information contained in this proposed rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau has submitted to OMB under the requirements of the PRA. Please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Bureau of Consumer Financial Protection. Send these comments by email to *oira_submission@omb.eop.gov* or by fax to 202–395–6974. If you wish to share your comments with the Bureau, please send a copy of these comments as described in the **ADDRESSES** section above. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at *www.reginfo.gov*.

Title of Collection: Regulation F: Fair Debt Collection Practices Act.

OMB Control Number: 3170–0056.

Type of Review: Revision of a currently approved collection.

Affected Public: Private Sector; State Governments.

Estimated Number of Respondents: 12,027.

Estimated Total Annual Burden Hours: 1,029,500.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposal will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

If applicable, the notice of final rule will display the control number assigned by OMB to any information collection requirements proposed herein and adopted in the final rule.

List of Subjects in 12 CFR Part 1006

Administrative practice and procedure, Consumer protection, Credit, Debt collection, Intergovernmental relations.

Authority and Issuance

■ For the reasons set forth above, the Bureau proposes to revise Regulation F, 12 CFR part 1006, to read as follows:

PART 1006—DEBT COLLECTION PRACTICES (REGULATION F)

Sec.

Subpart A—General

Subpart B—Rules for FDCPA Debt Collectors

Subpart C—[Reserved]

Subpart D—Miscellaneous

Authority: 12 U.S.C. 5512, 5514(b), 5531, 5532; 15 U.S.C. 1692*l*(d), 1692o, 7004.

Subpart A—General

§ 1006.1 Authority, purpose, and coverage.

(a) *Authority.* This part, known as Regulation F, is issued by the Bureau of Consumer Financial Protection pursuant to sections 814(d) and 817 of the Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692*l*(d), 1692o; title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-

Frank Act), 12 U.S.C. 5481 *et seq.;* and paragraphs (b)(1) and (d)(1) of section 104 of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act), 15 U.S.C. 7004.

(b) *Purpose.* This part carries out the purposes of the FDCPA, which include eliminating abusive debt collection practices by debt collectors, ensuring that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses. This part also prescribes requirements to ensure that certain features of debt collection are disclosed fully, accurately, and effectively to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with debt collection, in light of the facts and circumstances. Finally, this part sets record retention requirements to enable the Bureau to administer and carry out the purposes of the FDCPA, the Dodd-Frank Act, and this part, as well as to prevent evasions thereof. The record retention requirements also will facilitate supervision of debt collectors and the assessment and detection of risks to consumers.

(c) *Coverage.* (1) Except as provided in § 1006.108 and appendix A of this part regarding applications for State exemptions from the FDCPA, this part applies to debt collectors, as defined in § 1006.2(i), other than a person excluded from coverage by section 1029(a) of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Act (12 U.S.C. 5519(a)).

(2) Certain provisions of this part apply to debt collectors only when they are collecting consumer financial product or service debt as defined in § 1006.2(f). These provisions are §§ 1006.14(b)(1)(ii), 1006.34(c)(2)(iv) and (3)(iv), and 1006.30(b)(1)(ii).

§ 1006.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Act* or *FDCPA* means the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*).

(b) *Attempt to communicate* means any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person. An attempt to communicate includes providing a limited-content message, as defined in paragraph (j) of this section.

(c) *Bureau* means the Bureau of Consumer Financial Protection.

(d) *Communicate* or *communication* means the conveying of information regarding a debt directly or indirectly to any person through any medium. A debt collector does not convey information regarding a debt directly or indirectly to any person if the debt collector provides only a limited-content message, as defined in paragraph (j) of this section.

(e) *Consumer* means any natural person, whether living or deceased, obligated or allegedly obligated to pay any debt. For purposes of §§ 1006.6 and 1006.14(h), the term *consumer* includes the persons described in § 1006.6(a).

(f) *Consumer financial product or service debt* means any debt related to any consumer financial product or service, as that term is defined in section 1002(5) of the Dodd-Frank Act (12 U.S.C. 5481(5)).

(g) *Creditor* means any person who offers or extends credit creating a debt or to whom a debt is owed. The term creditor does not, however, include any person to the extent that such person receives an assignment or transfer of a debt in default solely to facilitate collection of the debt for another.

(h) *Debt,* except for the purpose of paragraph (f) of this section, means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services that are the subject of the transaction are primarily for personal, family, or household purposes, whether or not the obligation has been reduced to judgment. For the purpose of paragraph (f) of this section, debt means debt as that term is used in the Dodd-Frank Act.

(i)(1) *Debt collector* means any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, to another. Notwithstanding paragraph (h)(2)(vi) of this section, the term debt collector includes any creditor that, in the process of collecting its own debts, uses any name other than its own that would indicate that a third person is collecting or attempting to collect such debts. For the purpose of § 1006.22(e), the term also includes any person who uses any instrumentality of interstate commerce or mail in any business the principal purpose of which is the enforcement of security interests.

(2) The term debt collector excludes:

(i) Any officer or employee of a creditor while the officer or employee is collecting debts for the creditor in the creditor's name;

(ii) Any person while acting as a debt collector for another person if:

(A) The person acting as a debt collector does so only for persons with whom the person acting as a debt collector is related by common ownership or affiliated by corporate control; and

(B) The principal business of the person acting as a debt collector is not the collection of debts;

(iii) Any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of the officer's or employee's official duties;

(iv) Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(v) Any nonprofit organization that, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in liquidating their debts by receiving payment from such consumers and distributing such amounts to creditors;

(vi) Any person collecting or attempting to collect any debt owed or due, or asserted to be owed or due to another, to the extent such debt collection activity:

(A) Is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(B) Concerns a debt that such person originated;

(C) Concerns a debt that was not in default at the time such person obtained it; or

(D) Concerns a debt that such person obtained as a secured party in a commercial credit transaction involving the creditor; and

(vii) A private entity, to the extent such private entity is operating a bad check enforcement program that complies with section 818 of the Act.

(j) *Limited-content message* means a message for a consumer that includes all of the content described in paragraph (j)(1) of this section, that may include any of the content described in paragraph (j)(2) of this section, and that includes no other content.

(1) *Required content.* A limited-content message is a message for a consumer that includes all of the following:

(i) The consumer's name;

(ii) A request that the consumer reply to the message;

(iii) The name or names of one or more natural persons whom the consumer can contact to reply to the debt collector;

(iv) A telephone number that the consumer can use to reply to the debt collector; and

(v) If applicable, the disclosure required by § 1006.6(e).

(2) *Optional content.* In addition to the content described in paragraph (j)(1)

of this section, a limited-content message may include one or more of the following:

(i) A salutation;

(ii) The date and time of the message;

(iii) A generic statement that the message relates to an account; and

(iv) Suggested dates and times for the consumer to reply to the message.

(k) *Person* includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(l) *State* means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

Subpart B—Rules for FDCPA Debt Collectors

§ 1006.6 Communications in connection with debt collection.

(a) *Definition.* For purposes of this section, the term *consumer* includes:

(1) The consumer's spouse;

(2) The consumer's parent, if the consumer is a minor;

(3) The consumer's legal guardian;

(4) The executor or administrator of the consumer's estate, if the consumer is deceased; and

(5) A confirmed successor in interest, as defined in Regulation X, 12 CFR 1024.31, and Regulation Z, 12 CFR 1026.2(a)(27)(ii).

(b) *Communications with a consumer—in general.* Except as provided in paragraph (b)(4) of this section, a debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt as prohibited by paragraphs (b)(1) through (3) of this section.

(1) *Prohibitions regarding unusual or inconvenient times or places.* A debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt:

(i) At any unusual time, or at a time that the debt collector knows or should know is inconvenient to the consumer. In the absence of the debt collector's knowledge of circumstances to the contrary, a time before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location is inconvenient; or

(ii) At any unusual place, or at a place that the debt collector knows or should know is inconvenient to the consumer.

(2) *Prohibitions regarding consumer represented by an attorney.* A debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt if the debt collector knows the consumer is represented by an attorney with respect to the debt and knows, or can readily ascertain, the attorney's name and address, unless the attorney:

(i) Fails to respond within a reasonable period of time to a communication from the debt collector; or

(ii) Consents to the debt collector communicating directly with the consumer.

(3) *Prohibitions regarding consumer's place of employment.* A debt collector must not communicate or attempt to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(4) *Exceptions.* The prohibitions in paragraphs (b)(1) through (3) of this section do not apply when a debt collector communicates or attempts to communicate with a consumer in connection with the collection of any debt with:

(i) The prior consent of the consumer, given directly to the debt collector during a communication that does not violate paragraphs (b)(1) through (3) of this section; or

(ii) The express permission of a court of competent jurisdiction.

(c) *Communications with a consumer—after refusal to pay or cease communication notice.* (1) *Prohibitions.* Except as provided in paragraph (c)(2) of this section, a debt collector must not communicate or attempt to communicate further with a consumer with respect to a debt if the consumer notifies the debt collector in writing that:

(i) The consumer refuses to pay the debt; or

(ii) The consumer wants the debt collector to cease further communication with the consumer.

(2) *Exceptions.* The prohibitions in paragraph (c)(1) of this section do not apply when a debt collector communicates or attempts to communicate further with a consumer with respect to the debt:

(i) To advise the consumer that the debt collector's further efforts are being terminated;

(ii) To notify the consumer that the debt collector or creditor may invoke specified remedies that the debt collector or creditor ordinarily invokes; or

(iii) Where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

(d) *Communications with third parties.* (1) *Prohibitions.* Except as provided in paragraph (d)(2) of this section, a debt collector must not communicate, in connection with the collection of any debt, with any person other than:

(i) The consumer;

(ii) The consumer's attorney;

(iii) A consumer reporting agency, if otherwise permitted by law;

(iv) The creditor;

(v) The creditor's attorney; or

(vi) The debt collector's attorney.

(2) *Exceptions.* The prohibition in paragraph (d)(1) of this section does not apply when a debt collector communicates, in connection with the collection of any debt, with a person:

(i) For the purpose of acquiring location information, as provided in § 1006.10;

(ii) With the prior consent of the consumer given directly to the debt collector;

(iii) With the express permission of a court of competent jurisdiction; or

(iv) As reasonably necessary to effectuate a postjudgment judicial remedy.

(3) *Reasonable procedures for email and text message communications.* A debt collector maintains procedures that are reasonably adapted, for purposes of FDCPA section 813(c), to avoid a bona fide error in sending an email or text message communication that would result in a violation of paragraph (d)(1) of this section if the debt collector, when communicating with a consumer using an email address or, in the case of a text message, a telephone number, maintains procedures that include steps to reasonably confirm and document that:

(i) The debt collector communicated with the consumer using:

(A) An email address or, in the case of a text message, a telephone number that the consumer recently used to contact the debt collector for purposes other than opting out of electronic communications;

(B) A non-work email address or, in the case of a text message, a non-work telephone number, if:

(*1*) The creditor or the debt collector notified the consumer clearly and conspicuously, other than through the specific non-work email address or non-work telephone number, that the debt collector might use that non-work email address or non-work telephone number for debt collection communications by email or text message, where the creditor or debt collector provided the notification no more than 30 days before

the debt collector's first such communication, and the notification identified the legal name of the debt collector and the non-work email address or non-work telephone number the debt collector proposed to use, described one or more ways the consumer could opt out of such communications, and provided the consumer with a specified reasonable period in which to opt out before beginning such communications; and

(*2*) The opt-out period specified in the notice described in paragraph (d)(3)(i)(B)(*1*) of this section has expired and the consumer has not opted out of receiving debt collection communications at the specific non-work email address or non-work telephone number, as applicable; or

(C) A non-work email address or, in the case of a text message, a non-work telephone number that the creditor or a prior debt collector obtained from the consumer to communicate about the debt if, before the debt was placed with the debt collector, the creditor or the prior debt collector recently sent communications about the debt to that non-work email address or non-work telephone number, and the consumer did not request the creditor or the prior debt collector to stop using that non-work email address or non-work telephone number to communicate about the debt; and

(ii) The debt collector took additional steps to prevent communications using an email address or telephone number that the debt collector knows has led to a disclosure prohibited by paragraph (d)(1) of this section.

(e) *Opt-out notice for electronic communications or attempts to communicate.* A debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address must include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. The debt collector may not require, directly or indirectly, that the consumer, in order to opt out, pay any fee to the debt collector or provide any information other than the email address, telephone number for text messages, or other electronic-medium address subject to the opt out.

§ 1006.10 Acquisition of location information.

(a) *Definition.* The term *location information* means a consumer's:

(1) Place of abode and telephone number at such place; or

(2) Place of employment.

(b) *Form and content of location communications.* A debt collector communicating with a person other than the consumer for the purpose of acquiring location information must:

(1) Identify himself or herself individually by name, state that he or she is confirming or correcting the consumer's location information, and, only if expressly requested, identify his or her employer;

(2) Not state that the consumer owes any debt;

(3) Not communicate by postcard;

(4) Not use any language or symbol on any envelope or in the contents of any communication by mail indicating that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(5) After the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond to the debt collector's communication within a reasonable period of time.

(c) *Frequency of location communications.* In addition to complying with the frequency limits in § 1006.14(b), a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must not communicate more than once with such person unless requested to do so by such person, or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information.

§ 1006.14 Harassing, oppressive, or abusive conduct.

(a) *In general.* A debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any debt, including, but not limited to, the conduct described in paragraphs (b) through (h) of this section.

(b) *Repeated or continuous telephone calls or telephone conversations.* (1) *In general.* (i) *FDCPA prohibition.* In connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(ii) *Identification and prevention of Dodd-Frank Act unfair act or practice.* With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in § 1006.2(f), it is an unfair act or practice under section 1031 of the Dodd-Frank Act to place telephone calls or engage any person in telephone conversation repeatedly or continuously in connection with the collection of such debt, such that the natural consequence is to harass, oppress, or abuse any person at the called number. To prevent this unfair act or practice, such a debt collector must not exceed the frequency limits in paragraph (b)(2) of this section.

(2) *Frequency limits.* Subject to paragraph (b)(3) of this section, a debt collector violates paragraphs (b)(1)(i) and (ii) of this section, as applicable, by placing a telephone call to a particular person in connection with the collection of a particular debt either:

(i) More than seven times within seven consecutive days; or

(ii) Within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. The date of the telephone conversation is the first day of the seven-consecutive-day period.

(3) *Certain telephone calls excluded from the frequency limits.* Telephone calls placed to a person do not count toward, and are permitted in excess of, the frequency limits in paragraph (b)(2) of this section if they are:

(i) Made to respond to a request for information from such person;

(ii) Made with such person's prior consent given directly to the debt collector;

(iii) Not connected to the dialed number; or

(iv) With the persons described in § 1006.6(d)(1)(ii) through (vi).

(4) *Effect of complying with frequency limits.* A debt collector who does not exceed the frequency limits in paragraph (b)(2) of this section complies with paragraph (b)(1) of this section and section 806(5) of the FDCPA (15 U.S.C. 1692d(5)), and does not, based on the frequency of its telephone calls, violate paragraph (a) of this section, section 806 of the FDCPA (15 U.S.C. 1692d), or sections 1031 or 1036(a)(1)(B) of the Dodd-Frank Act (12 U.S.C. 5531 or 5536(a)(1)(B)).

(5) *Definition.* For purposes of this paragraph (b), *particular debt* means each of a consumer's debts in collection.

However, in the case of student loan debts, the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector.

(c) *Violence or other criminal means.* In connection with the collection of a debt, a debt collector must not use or threaten to use violence or other criminal means to harm the physical person, reputation, or property of any person.

(d) *Obscene or profane language.* In connection with the collection of a debt, a debt collector must not use obscene or profane language, or language the natural consequence of which is to abuse the hearer or reader.

(e) *Debtor's list.* In connection with the collection of a debt, a debt collector must not publish a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of sections 603(f) or 604(a)(3) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or 1681b(a)(3)).

(f) *Coercive advertisements.* In connection with the collection of a debt, a debt collector must not advertise for sale any debt to coerce payment of the debt.

(g) *Meaningful disclosure of identity.* In connection with the collection of a debt, a debt collector must not place telephone calls without meaningfully disclosing the caller's identity, except as provided in § 1006.10.

(h) *Prohibited communication media.* (1) *In general.* In connection with the collection of any debt, a debt collector must not communicate or attempt to communicate with a consumer through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the consumer. For purposes of this paragraph, the term ''consumer'' has the meaning given to it in § 1006.6(a).

(2) *Exceptions.* Notwithstanding the prohibition in paragraph (h)(1) of this section:

(i) If a consumer opts out in writing of receiving electronic communications from a debt collector, a debt collector may reply once to confirm the consumer's request to opt out, provided that the reply contains no information other than a statement confirming the consumer's request; or

(ii) If a consumer initiates contact with a debt collector using an address or a telephone number that the consumer previously requested the debt collector not use, the debt collector may respond once to that consumer-initiated communication.

§ 1006.18 False, deceptive, or misleading representations or means.

(a) *In general.* A debt collector must not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, but not limited to, the conduct described in paragraphs (b) through (d) of this section.

(b) *False, deceptive, or misleading representations.* (1) A debt collector must not falsely represent or imply that:

(i) The debt collector is vouched for, bonded by, or affiliated with the United States or any State, including through the use of any badge, uniform, or facsimile thereof.

(ii) The debt collector operates or is employed by a consumer reporting agency, as defined by section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

(iii) Any individual is an attorney or that any communication is from an attorney.

(iv) The consumer committed any crime or other conduct in order to disgrace the consumer.

(v) A sale, referral, or other transfer of any interest in a debt causes or will cause the consumer to:

(A) Lose any claim or defense to payment of the debt; or

(B) Become subject to any practice prohibited by this part.

(vi) Accounts have been turned over to innocent purchasers for value.

(vii) Documents are legal process.

(viii) Documents are not legal process forms or do not require action by the consumer.

(2) A debt collector must not falsely represent:

(i) The character, amount, or legal status of any debt.

(ii) Any services rendered, or compensation that may be lawfully received, by any debt collector for the collection of a debt.

(3) A debt collector must not represent or imply that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(c) *False, deceptive, or misleading collection means.* A debt collector must not:

(1) Threaten to take any action that cannot legally be taken or that is not intended to be taken.

(2) Communicate or threaten to communicate to any person credit information that the debt collector knows or should know is false, including the failure to communicate that a disputed debt is disputed.

(3) Use or distribute any written communication that simulates or that the debt collector falsely represents to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or that creates a false impression about its source, authorization, or approval.

(4) Use any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(d) *False representations or deceptive means.* A debt collector must not use any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(e) *Disclosures required.* (1) *Initial communications.* A debt collector must disclose in its initial communication with a consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. If the debt collector's initial communication with the consumer is oral, the debt collector must make the disclosure required by this paragraph again in its initial written communication with the consumer.

(2) *Subsequent communications.* In each communication with the consumer subsequent to the communications described in paragraph (e)(1) of this section, the debt collector must disclose that the communication is from a debt collector.

(3) *Exception.* Disclosures under paragraphs (e)(1) and (2) of this section are not required in a formal pleading made in connection with a legal action.

(f) *Assumed names.* This section does not prohibit a debt collector's employee from using an assumed name when communicating or attempting to communicate with a person, provided that the employee uses the assumed name consistently and that the employer can readily identify any employee using an assumed name.

(g) *Safe harbor for meaningful attorney involvement in debt collection litigation submissions.* A debt collector that is a law firm or who is an attorney complies with § 1006.18 when submitting a pleading, written motion, or other paper submitted to the court during debt collection litigation if an attorney personally:

(1) Drafts or reviews the pleading, written motion, or other paper; and

(2) Reviews information supporting such pleading, written motion, or other paper and determines, to the best of the

attorney's knowledge, information, and belief, that, as applicable:

(i) The claims, defenses, and other legal contentions are warranted by existing law;

(ii) The factual contentions have evidentiary support; and

(iii) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

§ 1006.22 Unfair or unconscionable means.

(a) *In general.* A debt collector must not use unfair or unconscionable means to collect or attempt to collect any debt, including, but not limited to, the conduct described in paragraphs (b) through (f) of this section.

(b) *Collection of unauthorized amounts.* A debt collector must not collect any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law. For purposes of this paragraph, the term ''any amount'' includes any interest, fee, charge, or expense incidental to the principal obligation.

(c) *Postdated payment instruments.* A debt collector must not:

(1) Accept from any person a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten, nor less than three, days (excluding legal public holidays, Saturdays, and Sundays) prior to such deposit.

(2) Solicit any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(3) Deposit or threaten to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(d) *Charges resulting from concealment of purpose.* A debt collector must not cause charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(e) *Nonjudicial action regarding property.* A debt collector must not take or threaten to take any nonjudicial action to effect dispossession or disablement of property if:

(1) There is no present right to possession of the property claimed as collateral through an enforceable security interest;

(2) There is no present intention to take possession of the property; or

(3) The property is exempt by law from such dispossession or disablement.

(f) *Restrictions on use of certain media.* A debt collector must not:

(1) Communicate with a consumer regarding a debt by postcard.

(2) Use any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by mail, except that a debt collector may use the debt collector's business name on an envelope if such name does not indicate that the debt collector is in the debt collection business.

(3) Communicate or attempt to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address.

(4) Communicate or attempt to communicate with a consumer in connection with the collection of a debt by a social media platform that is viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi).

(g) *Safe harbor for certain emails and text messages relating to the collection of a debt.* A debt collector who communicates with a consumer using an email address or telephone number and following the procedures described in § 1006.6(d)(3) does not violate paragraph (a) of this section by revealing in the email or text message the debt collector's name or other information indicating that the communication relates to the collection of a debt.

§ 1006.26 Collection of time-barred debts.

(a) *Definitions.* For purposes of this section:

(1) *Statute of limitations* means the period prescribed by applicable law for bringing a legal action against the consumer to collect a debt.

(2) *Time-barred debt* means a debt for which the applicable statute of limitations has expired.

(b) *Suits and threats of suit prohibited.* A debt collector must not bring or threaten to bring a legal action against a consumer to collect a debt that the debt collector knows or should know is a time-barred debt.

(c) [Reserved]

§ 1006.30 Other prohibited practices.

(a) *Communication prior to furnishing information.* A debt collector must not furnish to a consumer reporting agency, as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)), information regarding a debt before communicating with the consumer about the debt.

(b) *Prohibition on the sale, transfer, or placement of certain debts.* (1) *In general.* (i) *FDCPA prohibition.* Except as provided in paragraph (b)(2) of this section, a debt collector must not sell, transfer, or place for collection a debt if the debt collector knows or should know that:

(A) The debt has been paid or settled;

(B) The debt has been discharged in bankruptcy; or

(C) An identity theft report, as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a(q)(4)), was filed with respect to the debt.

(ii) *Identification of Dodd-Frank Act unfair act or practice.* With respect to a debt collector who is collecting a consumer financial product or service debt, as defined in § 1006.2(f), it is an unfair act or practice under section 1031 of the Dodd-Frank Act to sell, transfer, or place for collection a debt described in paragraph (b)(1)(i) of this section.

(2) *Exceptions.* A debt collector may sell, transfer, or place for collection a debt described in paragraph (b)(1)(i) of this section if the debt collector:

(i) Transfers the debt to the debt's owner;

(ii) Transfers the debt to a previous owner of the debt if transfer is authorized under the terms of the original contract between the debt collector and the previous owner;

(iii) Securitizes the debt or pledges a portfolio of such debt as collateral in connection with a borrowing; or

(iv) Transfers the debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the debt collector's assets.

(c) *Multiple debts.* If a consumer makes any single payment to a debt collector with respect to multiple debts owed by the consumer, the debt collector:

(1) Must apply the payment in accordance with the directions given by the consumer, if any; and

(2) Must not apply the payment to any debt that is disputed by the consumer.

(d) *Legal actions by debt collectors.* (1) *Action to enforce interest in real property.* A debt collector who brings a legal action against a consumer to enforce an interest in real property securing the consumer's debt must bring the action only in a judicial district or similar legal entity in which such real property is located.

(2) *Other legal actions.* A debt collector who brings a legal action against a consumer other than to enforce an interest in real property securing the consumer's debt must bring such action only in the judicial district or similar legal entity in which the consumer:

(i) Signed the contract sued upon; or

(ii) Resides at the commencement of the action.

(3) *Authorization of actions.* Nothing in this part authorizes debt collectors to bring legal actions.

(e) *Furnishing certain deceptive forms.* A debt collector must not design, compile, and furnish any form that the debt collector knows would be used to cause a consumer falsely to believe that a person other than the consumer's creditor is participating in collecting or attempting to collect a debt that the consumer allegedly owes to the creditor.

§ 1006.34 Notice for validation of debts.

(a)(1) *Validation information required.* Except as provided in paragraph (a)(2) of this section, a debt collector must provide a consumer with the validation information described in paragraph (c) of this section either:

(i) By sending the consumer a validation notice in a manner permitted by § 1006.42:

(A) In the initial communication, as defined in paragraph (b)(2) of this section; or

(B) Within five days of that initial communication; or

(ii) By providing the validation information orally in the initial communication.

(2) *Exception.* A debt collector who otherwise would be required to send a validation notice pursuant to paragraph (a)(1)(i)(B) of this section is not required to do so if the consumer has paid the debt prior to the time that paragraph (a)(1)(i)(B) of this section would require the validation notice to be sent.

(b) *Definitions.* For purposes of this section:

(1) *Clear and conspicuous* means disclosures that are readily understandable. In the case of written and electronic disclosures, the location and type size also must be readily noticeable to consumers. In the case of oral disclosures, the disclosures also must be given at a volume and speed sufficient for the consumer to hear and comprehend them.

(2) *Initial communication* means the first time that, in connection with the collection of a debt, a debt collector conveys information, directly or indirectly, regarding the debt to the consumer, other than a communication in the form of a formal pleading in a civil action, or any form or notice that does not relate to the collection of the debt and is expressly required by:

(i) The Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*);

(ii) Title V of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 through 6827); or

(iii) Any provision of Federal or State law or regulation mandating notice of a data security breach or privacy risk.

(3) *Itemization date* means any one of the following four reference dates for which a debt collector can ascertain the amount of the debt:

(i) The last statement date, which is the date of the last periodic statement or written account statement or invoice provided to the consumer;

(ii) The charge-off date, which is the date the debt was charged off;

(iii) The last payment date, which is the date the last payment was applied to the debt; or

(iv) The transaction date, which is the date of the transaction that gave rise to the debt.

(4) *Validation notice* means a written or electronic notice that provides the validation information described in paragraph (c) of this section.

(5) *Validation period* means the period starting on the date that a debt collector provides the validation information described in paragraph (c) of this section and ending 30 days after the consumer receives or is assumed to receive the validation information. For purposes of determining the end of the validation period, the debt collector may assume that a consumer receives the validation information on any date that is at least five days (excluding legal public holidays, Saturdays, and Sundays) after the debt collector provides it.

(c) *Validation information.* (1) *Debt collector communication disclosure.* The statement required by § 1006.18(e).

(2) *Information about the debt.* Except as provided in paragraph (c)(5) of this section:

(i) The debt collector's name and mailing address.

(ii) The consumer's name and mailing address.

(iii) If the debt is a credit card debt, the merchant brand, if any, associated with the debt, to the extent available to the debt collector.

(iv) If the debt collector is collecting consumer financial product or service debt as defined in § 1006.2(f), the name of the creditor to whom the debt was owed on the itemization date.

(v) The account number, if any, associated with the debt on the itemization date, or a truncated version of that number.

(vi) The name of the creditor to whom the debt currently is owed.

(vii) The itemization date.

(viii) The amount of the debt on the itemization date.

(ix) An itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments, and credits since the itemization date.

(x) The current amount of the debt.

(3) *Information about consumer protections.* (i) A statement that specifies what date the debt collector will consider the end date of the validation period and states that, if the consumer notifies the debt collector in writing before the end of the validation period that the debt, or any portion of the debt, is disputed, the debt collector must cease collection of the debt, or the disputed portion of the debt, until the debt collector sends the consumer either the verification of the debt or a copy of a judgment.

(ii) A statement that specifies what date the debt collector will consider the end date of the validation period and states that, if the consumer requests in writing before the end of the validation period the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector sends the consumer the name and address of the original creditor, if different from the current creditor.

(iii) A statement that specifies what date the debt collector will consider the end date of the validation period and states that, unless the consumer contacts the debt collector to dispute the validity of the debt, or any portion of the debt, before the end of the validation period, the debt collector will assume that the debt is valid.

(iv) If the debt collector is collecting consumer financial product or service debt as defined in § 1006.2(f), a statement that informs the consumer that additional information regarding consumer protections in debt collection is available on the Bureau's website at *https://www.consumerfinance.gov*.

(v) A statement explaining how a consumer can take the actions described in paragraphs (c)(4) and (d)(3), as applicable, of this section electronically, if the debt collector sends a validation notice electronically.

(vi) For a validation notice delivered in the body of an email pursuant to § 1006.42(b)(1) or (c)(2)(i), the opt-out statement required by § 1006.6(e).

(4) *Consumer response information.* The following information, segregated from the validation information described in paragraphs (c)(1) through (3) of this section and from any optional information included pursuant to paragraphs (d)(3)(i), (ii), (iv), and (v) of this section, and, if provided in a validation notice, located at the bottom of the notice under the headings, ''How do you want to respond?'' and ''Check all that apply:'':

(i) *Dispute prompts.* The following statements, listed in the following order, and using the following phrasing or

substantially similar phrasing, each next to a prompt:

(A) ''I want to dispute the debt because I think:;''

(B) ''This is not my debt;''

(C) ''The amount is wrong;'' and

(D) ''Other (please describe on reverse or attach additional information).''

(ii) *Original-creditor information prompt.* The statement, ''I want you to send me the name and address of the original creditor,'' using that phrase or a substantially similar phrase, next to a prompt.

(iii) *Mailing addresses.* Mailing addresses for the consumer and the debt collector, which include the debt collector's and the consumer's names.

(5) *Special rule for certain residential mortgage debt.* For residential mortgage debt subject to Regulation Z, 12 CFR 1026.41, a debt collector need not provide the validation information described in paragraphs (c)(2)(vii) through (ix) of this section if the debt collector:

(i) Provides the consumer at the same time as the validation notice, a copy of the most recent periodic statement provided to the consumer under Regulation Z, 12 CFR 1026.41(b); and

(ii) Refers to that periodic statement in the validation notice.

(d) *Form of validation information.* (1) *In general.* (i) The validation information described in paragraph (c) of this section must be clear and conspicuous.

(ii) If provided in a validation notice, the content, format, and placement of the validation information described in § 1006.34(c) and of the optional disclosures permitted by paragraph (d)(3) of this section must be substantially similar to Model Form B–3 in appendix B of this part.

(2) *Safe harbor.* A debt collector who uses Model Form B–3 in appendix B of this part complies with the requirements of paragraphs (a)(1)(i) and (d)(1) of this section.

(3) *Optional disclosures.* A debt collector may, at its option, include any of the following information if providing the validation information required by paragraph (a)(1) of this section.

(i) *Telephone contact information.* The debt collector's telephone contact information, including telephone number and the times that the debt collector accepts consumer telephone calls.

(ii) *Reference code.* A number or code that the debt collector uses to identify the debt or the consumer.

(iii) *Payment disclosures.* (A) The statement, ''Contact us about your payment options,'' using that phrase or a substantially similar phrase. The optional payment disclosure permitted by this paragraph must be no more prominent than any of the validation information described in paragraph (c) of this section; and

(B) With the consumer response information described in paragraph (c)(4) of this section, the statement ''I enclosed this amount,'' using that phrase or a substantially similar phrase, payment instructions after that statement, and a prompt. The optional payment disclosure permitted by this paragraph must be no more prominent than the validation information described in paragraph (c) of this section.

(iv) *Disclosures required by applicable law.* On the front of a validation notice, a statement that other disclosures required by applicable law appear on the reverse of the validation notice and, on the reverse of the validation notice, any such required disclosures.

(v) *Information about electronic communications.* The following information:

(A) The debt collector's website and email address.

(B) If validation information is not provided electronically, the statement described in paragraph (c)(3)(v) of this section explaining how a consumer can take the actions described in paragraphs (c)(4) and (d)(3) of this section electronically.

(vi) *Spanish-language translation disclosures.* The following disclosures regarding a consumer's ability to request a Spanish-language translation of a validation notice:

(A) The statement, ''Póngase en contacto con nosotros para solicitar una copia de este formulario en español'' (which means ''Contact us to request a copy of the form in Spanish''), using that phrase or a substantially similar phrase in Spanish. If providing this optional disclosure, a debt collector may include supplemental information in Spanish that specifies how a consumer may request a Spanish-language validation notice.

(B) With the consumer response information described in paragraph (c)(4) of this section, the statement ''Quiero esta forma en español'' (which means ''I want this form in Spanish''), using that phrase or a substantially similar phrase in Spanish, next to a prompt.

(4) *Validation notices delivered electronically.* If a debt collector delivers a validation notice electronically pursuant to § 1006.42, a debt collector may, at its option, format the validation notice as follows:

(i) *Prompts.* Any prompt described in paragraphs (c)(4)(i) or (ii) or paragraphs (d)(3)(iii)(B) or (vi)(B) of this section may be displayed electronically as a fillable field.

(ii) *Hyperlinks.* Hyperlinks may be embedded that, when clicked:

(A) Connect consumers to the debt collector's website; or

(B) Permit consumers to respond to the dispute and original-creditor information prompts described in paragraphs (c)(4)(i) and (ii) of this section.

(e) *Translation into other languages.* A debt collector may send the consumer a validation notice completely and accurately translated into any language if the debt collector also sends an English-language validation notice in the same communication that satisfies paragraph (a)(1) of this section. If a debt collector has already provided an English-language validation notice that satisfies paragraph (a)(1) of this section and subsequently provides the consumer a validation notice translated into any another language, the debt collector need not provide an additional copy of the English-language notice.

§ 1006.38 Disputes and requests for original-creditor information.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Duplicative dispute* means a dispute submitted by the consumer in writing within the validation period that:

(i) Is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied the requirements of paragraph (d)(2)(i) of this section; and

(ii) Does not include new and material information to support the dispute.

(2) *Validation period* has the same meaning given to it in § 1006.34(b)(5).

(b) *Overshadowing of rights to dispute or request original-creditor information.* During the validation period, a debt collector must not engage in any collection activities or communications that overshadow or are inconsistent with the disclosure of the consumer's rights to dispute the debt and to request the name and address of the original creditor.

(c) *Requests for original-creditor information.* Upon receipt of a request for the name and address of the original creditor submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt until the debt collector provides the name and address of the original creditor to the consumer in

writing or electronically in a manner permitted by § 1006.42.

(d) *Disputes.* (1) *Failure to dispute.* The failure of a consumer to dispute the validity of a debt does not constitute a legal admission of liability by the consumer.

(2) *Response to disputes.* Upon receipt of a dispute submitted by the consumer in writing within the validation period, a debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector:

(i) Provides a copy either of verification of the debt or of a judgment to the consumer in writing or electronically in a manner permitted by § 1006.42; or

(ii) In the case of a dispute that the debt collector reasonably determines is a duplicative dispute, either:

(A) Notifies the consumer in writing or electronically in a manner permitted by § 1006.42 that the dispute is duplicative, provides a brief statement of the reasons for the determination, and refers the consumer to the debt collector's response to the earlier dispute; or

(B) Satisfies paragraph (d)(2)(i) of this section.

§ 1006.42 Providing required disclosures.

(a) *Providing required disclosures.* (1) *In general.* A debt collector who provides disclosures required by this part in writing or electronically must do so in a manner that is reasonably expected to provide actual notice and in a form that the consumer may keep and access later.

(2) *Exceptions.* A debt collector need not comply with paragraph (a)(1) of this section when providing the disclosure required by § 1006.6(e) or § 1006.18(e) in writing or electronically, unless the disclosure is included on a notice required by § 1006.34(a)(1)(i) or § 1006.38(c) or (d)(2), or in an electronic communication containing a hyperlink to such notice.

(b) *Requirements for certain disclosures provided electronically.* To comply with paragraph (a) of this section, a debt collector who provides the validation notice described in § 1006.34(a)(1)(i)(B), or the disclosures described in § 1006.38(c) or (d)(2), electronically must:

(1) Except as provided in paragraph (c) of this section, provide the disclosure in accordance with section 101(c) of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) (15 U.S.C. 7001(c)) after the consumer provides affirmative consent directly to the debt collector;

(2) Identify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount;

(3) Permit receipt of notifications of undeliverability from communications providers, monitor for any such notifications, and treat any such notifications as precluding a reasonable expectation of actual notice for that delivery attempt; and

(4) When providing the validation notice described in § 1006.34(a)(1)(i)(B), provide the disclosure in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers.

(c) *Alternative procedures for providing certain disclosures electronically.* A debt collector who provides the validation notice described in § 1006.34(a)(1)(i)(B), or the disclosures described in § 1006.38(c) or (d)(2), electronically need not comply with paragraph (b)(1) of this section if the debt collector:

(1) Provides the disclosure by sending an electronic communication to an email address or, in the case of a text message, a telephone number that the creditor or a prior debt collector could have used to provide electronic disclosures related to that debt in accordance with section 101(c) of the E-SIGN Act; and

(2) Places the disclosure either:

(i) In the body of an email sent to an email address described in paragraph (c)(1) of this section; or

(ii) On a secure website that is accessible by clicking on a clear and conspicuous hyperlink included within an electronic communication sent to an email address or a telephone number described in paragraph (c)(1) of this section, provided that:

(A) The disclosure is accessible on the website for a reasonable period of time and can be saved or printed;

(B) The consumer receives notice and an opportunity to opt out of hyperlinked delivery as described in paragraph (d) of this section; and

(C) The consumer, during the opt-out period, has not opted out.

(d) *Notice and opportunity to opt out of hyperlinked delivery.* For a consumer to receive notice and an opportunity to opt out of hyperlinked delivery as required by paragraph (c)(2)(ii)(B) of this section, the debt collector must, before providing the disclosure, either:

(1) *Communication by the debt collector.* Inform the consumer, in a communication with the consumer, of:

(i) The name of the consumer who owes or allegedly owes the debt;

(ii) The name of the creditor to whom the debt currently is owed or allegedly owed;

(iii) The email address or telephone number from which the debt collector intends to send the electronic communication containing the hyperlink to the disclosure;

(iv) The email address or telephone number to which the debt collector intends to send the electronic communication containing the hyperlink to the disclosure;

(v) The consumer's ability to opt out of hyperlinked delivery of disclosures to such email address or telephone number; and

(vi) Instructions for opting out, including a reasonable period within which to opt out; or

(2) *Communication by the creditor.* Confirm that, no more than 30 days before the debt collector's electronic communication containing the hyperlink to the disclosure, the creditor communicated with the consumer using the email address or, in the case of a text message, the telephone number to which the debt collector intends to send the electronic communication and informed the consumer of:

(i) The placement or sale of the debt to the debt collector;

(ii) The name the debt collector uses when collecting debts;

(iii) The debt collector's option to use the consumer's email address or, in the case of a text message, the consumer's telephone number to provide any legally required debt collection disclosures in a manner that is consistent with Federal law; and

(iv) The information in paragraphs (d)(1)(iii), (v), and (vi) of this section.

(e) *Safe harbors.* (1) *Disclosures provided by mail.* A debt collector satisfies paragraph (a) of this section if the debt collector mails a printed copy of a disclosure to the consumer's residential address, unless the debt collector receives a notification from the entity or person responsible for delivery that the disclosure was not delivered.

(2) *Validation notice contained in the initial communication.* A debt collector who provides the validation notice described in § 1006.34(a)(1)(i)(A) within the body of an email that is the initial communication with the consumer satisfies paragraph (a)(1) of this section if the debt collector satisfies the requirements of paragraph (b) of this section for validation notices described in § 1006.34(a)(1)(i)(B). If such a debt

collector follows the procedures described in paragraph (c) of this section, the debt collector may, in lieu of sending the validation notice to an email address that the creditor or a prior debt collector could use for delivery of electronic disclosures in accordance with section 101(c) of the E-SIGN Act (as described in paragraph (c)(1) of this section), send the validation notice to an email address selected through the procedures described in § 1006.6(d)(3).

Subpart C—[Reserved]

Subpart D—Miscellaneous

§ 1006.100 Record retention.

(a) A debt collector must retain evidence of compliance with this part starting on the date that the debt collector begins collection activity on a debt until three years after:

(1) The debt collector's last communication or attempted communication in connection with the collection of the debt; or

(2) The debt is settled, discharged, or transferred to the debt owner or to another debt collector.

§ 1006.104 Relation to State laws.

Neither the Act nor the corresponding provisions of this part annul, alter, affect, or exempt any person subject to the provisions of the Act or the corresponding provisions of this part from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the Act or the corresponding provisions of this part, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with the Act or the corresponding provisions of this part if the protection such law affords any consumer is greater than the protection provided by the Act or the corresponding provisions of this part.

§ 1006.108 Exemption for State regulation.

(a) *Exemption for State regulation.* Any State may apply to the Bureau for a determination that, under the laws of that State, any class of debt collection practices within that State is subject to requirements that are substantially similar to, or provide greater protection for consumers than, those imposed under sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part, and that there is adequate provision for State enforcement of such requirements.

(b) *Procedures and criteria.* The procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o) are set forth in appendix A of this part.

Appendix A to Part 1006—Procedures for State Application for Exemption from the Provisions of the Act

I. Purpose and Definitions

(a) This appendix establishes procedures and criteria whereby States may apply to the Bureau for exemption of a class of debt collection practices within the applying State from the provisions of the Act and the corresponding provisions of this part as provided in section 817 of the Act (15 U.S.C. 1692o).

(b) For purposes of this appendix:

(1) *Applicant State law* means the State law that, for a class of debt collection practices within that State, is claimed to contain requirements that are substantially similar to the requirements that relevant Federal law imposes on that class of debt collection practices, and that contains adequate provision for State enforcement.

(2) *Class of debt collection practices* includes one or more such classes of debt collection practices referred to in paragraph I(b)(1) of this appendix.

(3) *Relevant Federal law* means sections 803 through 812 of the Act (15 U.S.C. 1692a through 1692j) and the corresponding provisions of this part.

(4) *State law* includes State statutes, any regulations that implement State statutes, and formal interpretations of State statutes or regulations by a court of competent jurisdiction or duly authorized State agency.

II. Application

Any State may apply to the Bureau pursuant to the terms of this appendix for a determination that the applicant State law contains requirements that, for a class of debt collection practices within that State, are substantially similar to, or provide greater protection for consumers than, the requirements that relevant Federal law imposes on that class of debt collection practices, and that contains adequate provision for State enforcement. The application must be in writing, addressed to the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552, signed by the Governor, Attorney General, or State official having primary enforcement responsibility under the State law that applies to the class of debt collection practices, and must be supported by the documents specified in this appendix.

III. Supporting Documents

The application must be accompanied by the following, which may be submitted in paper or electronic form:

(a) A copy of the applicant State law.

(b) A comparison of each provision of relevant Federal law with the corresponding provisions of the applicant State law, together with reasons supporting the claim that the corresponding provisions of the applicant State law are substantially similar to, or provide greater protection to consumers than, the provisions of relevant Federal law and an explanation as to why any differences between the State statute or regulation and Federal law are not inconsistent with the provisions of relevant Federal law and do not result in a diminution in the protection otherwise afforded consumers; and a statement that no other State laws (including administrative or judicial interpretations) are related to, or would have an effect upon, the State law that is being considered by the Bureau in making its determination.

(c) A comparison of the provisions of the State law that provide for enforcement with the provisions of section 814 of the Act (15 U.S.C. 1692*l*), together with reasons supporting the claim that the applicant State law provides for adequate administrative enforcement.

(d) A statement identifying the office designated or to be designated to enforce the applicant State law. The statement must show how the office provides for adequate enforcement of the applicant State law, including by showing that the office has necessary facilities, personnel, and funding. The statement must include, for example, complete information regarding the fiscal arrangements for administrative enforcement (including the amount of funds available or to be provided), the number and qualifications of personnel engaged or to be engaged in enforcement, and a description of the procedures under which the applicant State law is to be enforced by the State.

IV. Criteria for Determination

The Bureau will consider the criteria set forth below, and any other relevant information, in determining whether applicant State law is substantially similar to, or provides greater protection to consumers than, relevant Federal law and whether there is adequate provision for enforcement of the applicant State law. In making that determination, the Bureau primarily will consider each provision of the applicant State law in comparison with each corresponding provision in relevant Federal law, and not the State law as a whole in comparison with the Act as a whole.

(a)(1) In order for the applicant State law to be substantially similar to relevant Federal law, the applicant State law at least must provide that:

(i) Definitions and rules of construction, as applicable, import a meaning and have an application that are substantially similar to, or more protective of consumers than, those prescribed by relevant Federal law.

(ii) Debt collectors provide all of the applicable notices required by relevant Federal law, with the content and in the terminology, form, and time periods prescribed pursuant to relevant Federal law. The Bureau may determine whether additional notice requirements under the applicant State law affect a determination that the applicant State law is substantially similar to relevant Federal law.

(iii) Debt collectors take all affirmative actions and abide by obligations substantially

similar to, or more protective of consumers than, those prescribed by relevant Federal law under substantially similar or more protective conditions and within the substantially similar or more protective time periods as are prescribed under relevant Federal law;

(iv) Debt collectors abide by prohibitions that are substantially similar to or more protective of consumers than those prescribed by relevant Federal law;

(v) Consumers' obligations or responsibilities are no more costly, lengthy, or burdensome than consumers' corresponding obligations or responsibilities under relevant Federal law; and

(vi) Consumers' rights and protections are substantially similar to, or more protective of consumers than, those provided by relevant Federal law under conditions or within time periods that are substantially similar to, or more protective of consumers than, those prescribed by relevant Federal law.

(2) In applying the criteria set forth in paragraph IV(a)(1) of this appendix, the Bureau will not consider adversely any additional requirements of State law that are not inconsistent with the purpose of the Act or the requirements imposed under relevant Federal law.

(b) In determining whether provisions for enforcement of the applicant State law are adequate, consideration will be given to the extent to which, under the applicant State law, provision is made for administrative enforcement, including necessary facilities, personnel, and funding.

V. Public Comment

In connection with any application that has been filed in accordance with the requirements of parts II and III of this appendix and following initial review of the application, a proposed rule concerning the application for exemption will be published by the Bureau in the **Federal Register**, and a copy of such application will be made available for examination by interested persons during business hours at the Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552. A comment period will be allowed from the date of such publication for interested parties to submit written comments to the Bureau regarding that application.

VI. Exemption From Requirements

If the Bureau determines on the basis of the information before it that, under the applicant State law, a class of debt collection practices is subject to requirements substantially similar to, or that provide greater protection to consumers than, those imposed under relevant Federal law and that there is adequate provision for State enforcement, the Bureau will exempt the class of debt collection practices in that State from the requirements of relevant Federal law and section 814 of the Act in the following manner and subject to the following conditions:

(a) A final rule granting the exemption will be published in the **Federal Register**, and the Bureau will furnish a copy of such rule to the State official who made application for such exemption, to each Federal authority responsible for administrative enforcement of the requirements of relevant Federal law, and to the Attorney General of the United States. Any exemption granted will be effective 90 days after the date of publication of such rule in the **Federal Register**.

(b) Any State that receives an exemption must, through its appropriate official, take the following steps:

(i) Inform the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552 in writing within 30 days of any change in the applicant State law. The report of any such change must contain copies of the full text of that change, together with statements setting forth the information and opinions regarding that change that are specified in paragraph III.

(ii) Provide, not later than two years after the date the exemption is granted, and every two years thereafter, a report to the Bureau in writing concerning the manner in which the State has enforced the applicant State law in the preceding two years and an update of the information required under paragraph III(d) of this appendix.

(c) The Bureau will inform any State that receives such an exemption, through its appropriate official, of any subsequent amendments of the Act or this part that might necessitate the amendment of State law for the exemption to continue.

(d) After an exemption is granted, the requirements of the applicable State law constitute the requirements of relevant Federal law, except to the extent such State law imposes requirements not imposed by the Act or this part.

VII. Adverse Determination

(a) If, after publication of a proposed rule in the **Federal Register** as provided under part V of this appendix, the Bureau finds on the basis of the information before it that it cannot make a favorable determination in connection with the application, the Bureau will notify the appropriate State official of the facts upon which such findings are based and will afford that State authority a reasonable opportunity to submit additional materials that demonstrate the basis for granting an exemption.

(b) If, after having afforded the State authority such opportunity to demonstrate the basis for granting an exemption, the Bureau finds on the basis of the information before it that it still cannot make a favorable determination in connection with the application, the Bureau will publish in the **Federal Register** a final rule containing its determination regarding the application and will furnish a copy of such rule to the State official who made application for such exemption.

VIII. Revocation of Exemption

(a) The Bureau reserves the right to revoke any exemption granted under the provisions of the Act or this part, if at any time it determines that the State law does not, in fact, impose requirements that are substantially similar to, or that provide greater protection to consumers than, relevant Federal law or that there is not, in fact, adequate provision for State enforcement.

(b) Before revoking any such exemption, the Bureau will notify the State of the facts or conduct that, in the Bureau's opinion, warrant such revocation, and will afford that State such opportunity as the Bureau deems appropriate in the circumstances to demonstrate continued eligibility for an exemption.

(c) If, after having been afforded the opportunity to demonstrate or achieve compliance, the Bureau determines that the State has not done so, a proposed rule to revoke such exemption will be published in the **Federal Register**. A comment period will be allowed from the date of such publication for interested persons to submit written comments to the Bureau regarding the intention to revoke.

(d) If such exemption is revoked, a final rule revoking the exemption will be published by the Bureau in the **Federal Register**, and a copy of such rule will be furnished to the State, to the Federal authorities responsible for enforcement of the requirements of the Act, and to the Attorney General of the United States. The revocation becomes effective, and the class of debt collection practices affected within that State become subject to the requirements of sections 803 through 812 of the Act and the corresponding provisions of this part, 90 days after the date of publication of the final rule in the **Federal Register**.

Appendix B to Part 1006—Model Forms and Clauses

B–1 [Reserved]

B–2 [Reserved]

B–3 Model Form for Validation Notice § 1006.34

BILLING CODE 4810–AM–P

North South Group
P.O. Box 121212
Pasadena, CA 91111-2222
(800) 123-4567 from 8am to 8pm EST, Monday to Saturday
www.example.com

To: Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

Reference: 584-345

North South Group is a debt collector. We are trying to collect a debt that you owe to Bank of Rockville. We will use any information you give us to help collect the debt.

Our information shows:

You had a Main Street Department Store credit card from Bank of Rockville with account number 123-456-789.

As of January 2, 2017, you owed:		$ 2,234.56
Between January 2, 2017 and today:		
You were charged this amount in interest:	+	$ 75.00
You were charged this amount in fees:	+	$ 25.00
You paid or were credited this amount toward the debt:	–	$ 50.00
Total amount of the debt now:		**$ 2,284.56**

How can you dispute the debt?

- **Call or write to us by November 12, 2019, to dispute all or part of the debt.** If you do not, we will assume that our information is correct. If you write to us by November 12, 2019, we must stop collection on any amount you dispute until we send you information that shows you owe the debt.
- You may use the form below or you may write to us without the form. You may also include supporting documents. We accept disputes electronically at www.example.com/dispute.

What else can you do?

- **Write to ask for the name and address of the original creditor.** If you write by November 12, 2019, we will stop collection until we send you that information. You may use the form below or write to us without the form. We accept such requests electronically at www.example.com/request.
- **Learn more about your rights under federal law.** For instance, you have the right to stop or limit how we contact you. Go to www.consumerfinance.gov.
- Contact us about your payment options.
- Review state law disclosures on reverse side, if applicable.
- Póngase en contacto con nosotros para solicitar una copia de este formulario en español.

Mail this form to:
North South Group
P.O. Box 121212
Pasadena, CA 91111-2222

Person A
2323 Park Street
Apartment 342
Bethesda, MD 20815

How do you want to respond?

Check all that apply:

- ☐ **I want to dispute the debt because I think:**
  - ☐ This is not my debt.
  - ☐ The amount is wrong.
  - ☐ Other (please describe on reverse or attach additional information).
- ☐ **I want you to send me the name and address of the original creditor.**
- ☐ **I enclosed this amount:** $

Make your check payable to *North South Group*. Include the reference number 584-345.

☐ **Quiero esta forma en español.**

BILLING CODE 4810–AM–C

Appendix C to Part 1006—Issuance of Advisory Opinions

1. *Advisory opinions.* Any act done or omitted in good faith in conformity with any advisory opinion issued by the Bureau, including advisory opinions referenced in this appendix, provides the protection afforded under section 813(e) of the Act. The Bureau will amend this appendix periodically to incorporate references to advisory opinions that the Bureau issues.

2. *Requests for issuance of advisory opinions.* A request for an advisory opinion should be in writing and addressed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. The request should contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Designated officials will review and respond to requests for advisory opinions.

3. *Bureau-issued advisory opinions.* The Bureau has issued the following advisory opinions:

a. *Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z),* 81 FR 71977 (Oct. 19, 2016).

Supplement I to Part 1006—Official Interpretations

Introduction

1. *Official status.* This commentary is the vehicle by which the Bureau of Consumer Financial Protection supplements Regulation F, 12 CFR part 1006, and has been issued under the Bureau's authority to prescribe rules under 15 U.S.C. 1692*l*(d) in accordance with the notice-and-comment procedures for informal rulemaking under the Administrative Procedure Act. Unless specified otherwise, references in this commentary are to sections of Regulation F or the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* No commentary is expected to be issued other than by means of this Supplement I.

2. *Procedure for requesting interpretations.* Anyone may request that an official interpretation of the regulation be added to this commentary. A request for such an official interpretation must be in writing and addressed to the Associate Director, Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. The request must contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents. Interpretations that are adopted will be incorporated in this commentary following publication in the **Federal Register**.

3. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph that it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, comments to § 1006.34(b)(3) are further divided by subparagraph, such as comment 34(b)(3)(i)–1 and comment 34(b)(3)(iv)–1. Comments that have more general application are designated, for example, as comments 38–1 and 38–2. This introduction may be cited as comments I–1, I–2, and I–3.

Subpart A—General

Section 1006.2—Definitions

2(b) Attempt to communicate.

1. *Examples.* Section 1006.2(b) defines an attempt to communicate as any act to initiate a communication or other contact with any person through any medium, including by soliciting a response from such person. An act to initiate a communication or other contact with a person is an attempt to communicate regardless of whether the attempt, if successful, would be a communication that conveys information regarding a debt directly or indirectly to any person. Attempts to communicate include, but are not limited to, the following:

i. Placing a telephone call to a person, regardless of whether the debt collector speaks to any person at the called number; or

ii. Transmitting a limited-content message, as defined in § 1006.2(j), to a consumer by voicemail or text message sent directly to the consumer or by an oral message left with a third party who answers the consumer's home or mobile telephone number.

2(d) Communicate or communication.

1. *Any medium.* Section 1006.2(d) provides, in relevant part, that a communication can occur through any medium. ''Any medium'' includes any oral, written, electronic, or other medium. For example, a communication may occur in person or by telephone, audio recording, paper document, mail, email, text message, social media, or other electronic media.

2(j) Limited-content message.

1. *In general.* Section 1006.2(j) provides that a limited-content message is a message for a consumer that includes all of the content described in § 1006.2(j)(1), that may include any of the content described in § 1006.2(j)(2), and that includes no other content. Any other message is not a limited-content message. If a message includes content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information about a debt, including but not limited to any information that indicates that the message relates to the collection of a debt, the message is a communication, as defined in § 1006.2(d). For example, a message that includes the consumer's account number is not a limited-content message because it includes more than a generic statement that the message relates to an account.

2. *Examples.* i. The following example illustrates a limited-content message that includes only the content described in § 1006.6(j)(1): ''This is Robin Smith calling for Sam Jones. Sam, please contact me at 1–800–555–1212.''

ii. The following example illustrates a limited-content message that includes the content described in both § 1006.6(j)(1) and (2): ''Hi, this message is for Sam Jones. Sam, this is Robin Smith. I'm calling to discuss an account. It is 4:15 p.m. on Wednesday, September 1. You can reach me or, Jordan Johnson, at 1–800–555–1212 today until 6:00 p.m. eastern, or weekdays from 8:00 a.m. to 6:00 p.m. eastern.''

3. *Message for a consumer.* A debt collector may transmit a limited-content message to a consumer by, for example, leaving a voicemail at the consumer's telephone number, sending a text message to the consumer's mobile telephone number, or leaving a message orally with a third party who answers the consumer's home or mobile telephone. Other provisions of this part may, in certain circumstances, restrict a debt collector from transmitting a limited-content message or otherwise attempting to communicate with a consumer. See §§ 1006.6(b) and (c) and 1006.22(f) and their related commentary for further guidance regarding when a debt collector is prohibited from attempting to communicate with a consumer.

4. *Meaningful disclosure of identity.* A debt collector who places a telephone call and leaves only a limited-content message for a consumer does not violate § 1006.14(g) with respect to that telephone call.

Paragraph 2(j)(1)(iv).

1. *Telephone number that the consumer can use to respond.* Section 1006.2(j)(1)(iv) provides that a limited-content message includes a telephone number that the consumer can use to reply to the debt collector. A voicemail or text message that spells out, rather than enumerates numerically, a vanity telephone number is not a limited-content message.

Subpart B—Rules for FDCPA Debt Collectors

Section 1006.6—Communications in Connection With Debt Collection

6(a) Consumer.

Paragraph 6(a)(1).

1. *Spouse.* Section 1006.6(a)(1) provides that, for purposes of § 1006.6, the term consumer includes a consumer's spouse. The surviving spouse of a deceased consumer is a spouse as that term is used in § 1006.6(a)(1).

Paragraph 6(a)(2).

1. *Parent.* Section 1006.6(a)(2) provides that, for purposes of § 1006.6, the term consumer includes a consumer's parent, if the consumer is a minor. A parent of a deceased minor consumer is a parent as that term is used in § 1006.6(a)(2).

Paragraph 6(a)(4).

1. *Personal representative.* Section 1006.6(a)(4) provides that, for purposes of § 1006.6, the term consumer includes the executor or administrator of the consumer's estate, if the consumer is deceased. The terms executor or administrator include the personal representative of the consumer's estate. A personal representative is any person who is authorized to act on behalf of the deceased consumer's estate. Persons with such authority may include personal representatives under the informal probate and summary administration procedures of many States, persons appointed as universal successors, persons who sign declarations or affidavits to effectuate the transfer of estate assets, and persons who dispose of the deceased consumer's assets extrajudicially.

6(b) Communications with a consumer—in general.

6(b)(1) Prohibitions regarding unusual or inconvenient times or places.

1. *Designation of inconvenience.* Section 1006.6(b)(1) prohibits a debt collector from, among other things, communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer. The debt collector may know, or should know, that a time or place is inconvenient if the consumer uses the word ''inconvenient'' to notify the debt collector. In addition, depending on the facts and circumstances, the debt collector may know, or should know, that a time or place is inconvenient even if the consumer does not use the word ''inconvenient'' to notify the debt collector. Further, if the consumer initiates a communication with the debt collector at a time or from a place that the consumer previously designated as inconvenient, the debt collector may respond once to that consumer-initiated communication at that time or place. After that response, the debt collector must not communicate or attempt to communicate further with the consumer at that time or place until the consumer conveys that the time or place is no longer inconvenient. For example (unless an exception in § 1006.6(b)(4) applies):

i. Assume that a consumer tells a debt collector that the consumer ''is busy'' or ''cannot talk'' on weekdays from 3:00 p.m. to 5:00 p.m. Based on these facts, the debt collector knows or should know that, on weekdays, the time period between 3:00 p.m. and 5:00 p.m. is inconvenient to the consumer and, thereafter, the debt collector must not communicate or attempt to communicate with the consumer between those times.

ii. Assume the same facts as in comment 6(b)(1)–1.i, except that, after the consumer tells the debt collector that the consumer ''is busy'' or ''cannot talk'' on weekdays from 3:00 p.m. to 5:00 p.m., the consumer initiates a communication with the debt collector at 4:30 p.m. on a weekday. Based on these facts, § 1006.6(b)(1)(i) does not prohibit the debt collector from responding once to the consumer. Unless the consumer otherwise informs the debt collector, however, § 1006.6(b)(1)(i) prohibits the debt collector from future communications or attempts to communicate with the consumer between 3:00 p.m. and 5:00 p.m. on weekdays.

iii. Assume that a consumer tells a debt collector not to communicate with the consumer at school. Based on these facts, the debt collector knows or should know that communications to the consumer at school are inconvenient and, thereafter, the debt collector must not communicate or attempt to communicate with the consumer at that place.

iv. Assume the same facts as in comment 6(b)(1)–1.iii, except that, after the consumer tells the debt collector not to communicate with the consumer at school, the consumer initiates a communication with the debt collector from school. Based on these facts, § 1006.6(b)(1)(ii) does not prohibit the debt collector from responding once to the consumer. Unless the consumer otherwise informs the debt collector, however, § 1006.6(b)(1)(ii) prohibits the debt collector from future communications or attempts to communicate with the consumer at school.

Paragraph 6(b)(1)(i).

1. *Time of electronic communication.* Under § 1006.6(b)(1)(i), a debt collector is prohibited from communicating or attempting to communicate electronically, such as through email or text message, at a time the debt collector knows or should know is inconvenient to the consumer. For purposes of determining the time of an electronic communication under § 1006.6(b)(1)(i), an electronic communication occurs when the debt collector sends it, not, for example, when the consumer receives or views it.

2. *Consumer's location.* Under § 1006.6(b)(1)(i), in the absence of the debt collector's knowledge of circumstances to the contrary, an inconvenient time for communicating with a consumer is before 8:00 a.m. and after 9:00 p.m. local time at the consumer's location. If a debt collector is unable to determine a consumer's location, then, in the absence of knowledge of circumstances to the contrary, the debt collector complies with § 1006.6(b)(1)(i) if the debt collector communicates or attempts to communicate with the consumer at a time that would be convenient in all of the locations at which the debt collector's information indicates the consumer might be located. The following examples, which assume that the debt collector has no information about times the consumer considers inconvenient or other information about the consumer's location, illustrate the rule.

i. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a street address in the Pacific time zone. The convenient times to communicate with the consumer are after 11:00 a.m. Eastern time (8:00 a.m. Pacific time) and before 9:00 p.m. Eastern time (6:00 p.m. Pacific time).

ii. Assume that a debt collector's information indicates that a consumer has a mobile telephone number with an area code associated with the Eastern time zone and a landline telephone number with an area code associated with the Mountain time zone. The convenient times to communicate with the consumer are after 10:00 a.m. Eastern time (8:00 a.m. Mountain time) and before 9:00 p.m. Eastern time (7:00 p.m. Mountain time).

6(b)(3) Prohibitions regarding consumer's place of employment.

1. *Work email.* Section 1006.6(b)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt at the consumer's place of employment, if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. For special rules regarding a consumer's work email, see § 1006.22(f)(3).

6(b)(4) Exceptions.

Paragraph 6(b)(4)(i).

1. *Prior consent—in general.* Section 1006.6(b)(4)(i) provides, in part, that the prohibitions in § 1006.6(b)(1) on a debt collector communicating or attempting to communicate with a consumer in connection with the collection of any debt at a time or place that the debt collector knows or should know is inconvenient to the consumer do not apply if the debt collector communicates or attempts to communicate with the prior consent of the consumer. If the debt collector learns during a communication that the debt collector is communicating with a consumer at an inconvenient time or place, the debt collector may ask the consumer what time or place would be convenient. However, the debt collector cannot during that communication ask the consumer to consent to the continuation of the communication with the consumer at the inconvenient time or place.

2. *Directly to the debt collector.* Section 1006.6(b)(4)(i) requires the prior consent of the consumer to be given directly to the debt collector. For example, a debt collector cannot rely on the prior consent of the consumer given to the original creditor or to a previous debt collector.

6(c) Communications with a consumer—after refusal to pay or cease communication notice.

6(c)(1) Prohibitions.

1. *Notification complete upon receipt.* If, pursuant to § 1006.6(c)(1), a consumer notifies a debt collector in writing or in electronic form using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, that the consumer either refuses to pay a debt or wants the debt collector to cease further communication with the consumer, notification is complete upon the debt collector's receipt of that information.

2. *Interpretation of the E-SIGN Act.* Comment 6(c)(1)–1 constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to FDCPA section 805(c). Under this interpretation, section 101(a) of the E-SIGN Act enables a consumer to satisfy the requirement in FDCPA section 805(c) that the consumer's notification of the debt collector be ''in writing'' through an electronic request. Further, section 101(b) of the E-SIGN Act is not contravened because the consumer may only satisfy the writing requirement using a medium of electronic communication through which a debt collect accepts electronic communications from consumers.

6(c)(2) Exceptions.

1. *Written early intervention notice for mortgage servicers.* The Bureau has interpreted the written early intervention notice required by 12 CFR 1024.39(d)(3) to fall within the exceptions to the cease communication provision in FDCPA section 805(c)(2) and (3). See 12 CFR 1024.39(d)(3), its commentary, and the Bureau's 2016 FDCPA Interpretive Rule (81 FR 71977 (Oct. 19, 2016)).

6(d) Communications with third parties.

6(d)(1) Prohibitions.

1. *Limited-content message.* Section 1006.2(j) provides, in part, that a limited-content message is not a communication, as defined in § 1006.2(d). Because a limited-content message is not a communication, a debt collector does not violate § 1006.6(d)(1) if the debt collector leaves a limited-content message for a consumer with a third party who answers the consumer's home or mobile telephone. Such a message is an attempt to communicate, as defined in § 1006.2(b), with the consumer. However, if, during the course of the interaction with the third party, the debt collector conveys content other than the specific items described in § 1006.2(j)(1) and (2), and such other content directly or indirectly conveys any information regarding a debt, the message is a communication, as defined in § 1006.2(d), subject to the prohibition on third-party communications in § 1006.6(d)(1). See § 1006.2(j) and its related commentary for further guidance concerning limited-content messages.

6(d)(2) Exceptions.

1. *Prior consent.* See the commentary to § 1006.6(b)(4)(i) for guidance concerning a consumer giving prior consent directly to a debt collector.

6(d)(3) Reasonable procedures for email and text message communications.

Paragraph 6(d)(3)(i).

1. *Non-work email address and telephone number.* For purposes of § 1006.6(d)(3)(i)(B) and (C), an email address is a non-work email address unless the debt collector knows or should know that the email address is provided to the consumer by the consumer's

employer. For purposes of § 1006.6(d)(3)(i)(B) and (C), a telephone number is a non-work telephone number unless the debt collector knows or should know that the telephone number is provided to the consumer by the consumer's employer. See § 1006.22(f)(3) and its related commentary for clarification regarding when a debt collector knows or should know that an email address is provided by a consumer's employer.

Paragraph 6(d)(3)(i)(B).

Paragraph 6(d)(3)(i)(B)(1).

1. *Format of notice.* The opt-out notice described in § 1006.6(d)(3)(i)(B)(*1*) may be provided orally, in writing, or electronically. The notice must be provided clearly and conspicuously, as defined in § 1006.34(b)(1). If the notice is provided in writing or electronically, it must comply with the requirements of § 1006.42(a).

2. *Reasonable period for consumer to opt out in an oral communication.* If a creditor or a debt collector provides the opt-out notice described in § 1006.6(d)(3)(i)(B)(*1*) to the consumer in an oral communication, such as a telephone or in-person conversation, the creditor or the debt collector may require the consumer to make an opt-out decision during that same communication.

3. *Combined notice concerning electronic communications and hyperlinked delivery of notices.* A debt collector or a creditor may include the opt-out notice described in § 1006.6(d)(3)(i)(B)(*1*) in the same communication as the opt-out notice described in § 1006.42(d)(1) or (2), as applicable.

Paragraph 6(d)(3)(i)(B)(2).

1. *Expiration of opt-out period.* Pursuant to § 1006.6(d)(3)(i)(B)(*2*), a debt collector may obtain a safe harbor from liability for making a disclosure that violates § 1006.6(d)(1) if, among other things, the debt collector communicates with a consumer using a specific non-work email address or non-work telephone number after the expiration of a specified opt-out period, if the consumer has not opted out. However, if the consumer requests after the expiration of the opt-out period that the debt collector not use the specific non-work email address or non-work telephone number, § 1006.14(h) prohibits the debt collector from communicating or attempting to communicate with the consumer using that email address or telephone number. Likewise, if the consumer requests after the expiration of the opt-out period that the debt collector not communicate with the consumer by email or text message, § 1006.14(h) prohibits the debt collector from communicating or attempting to communicate with the consumer by email or text message, including by using the specific non-work email address or non-work telephone number. See § 1006.14(h).

6(e) Opt-out notice for electronic communications or attempts to communicate.

1. *In general.* Section 1006.6(e) requires a debt collector who communicates or attempts to communicate with a consumer electronically in connection with the collection of a debt using a specific email address, telephone number for text messages, or other electronic-medium address to include in such communication or attempt to communicate a clear and conspicuous statement describing one or more ways the consumer can opt out of further electronic communications or attempts to communicate by the debt collector to that address or telephone number. Clear and conspicuous has the same meaning as in § 1006.34(b)(1). The following examples illustrate the rule.

i. Assume that a debt collector sends a text message to a consumer's mobile telephone number. Pursuant to § 1006.6(e), the text message must contain a clear and conspicuous statement describing how the consumer can opt out of receiving further text messages from the debt collector to that telephone number. For example, a text message would comply with this requirement by including the following instruction: ''Reply STOP to stop texts to this telephone number.''

ii. Assume that a debt collector sends the consumer an email message. Pursuant to § 1006.6(e), the email message must contain a clear and conspicuous statement describing how the consumer can opt out of receiving further email messages from the debt collector to that email address. For example, an email would comply with this requirement by including instructions in a textual format in the email, in a type size no smaller than the other text in the email, explaining that the consumer may opt out of receiving further email communications from the debt collector to that email address by replying with the word ''stop'' in the subject line.

Section 1006.10—Acquisition of Location Information

10(a) Definition.

1. *Location information about deceased consumers.* If a consumer obligated or allegedly obligated to pay any debt is deceased, location information includes the information described in § 1006.10(a) for a person who is authorized to act on behalf of the deceased consumer's estate.

10(b) Form and content of location communications.

Paragraph 10(b)(2).

1. *Executors, administrators, or personal representatives of a deceased consumer's estate.* Section 1006.10(b)(2) prohibits a debt collector who is communicating with any person other than the consumer for the purpose of acquiring location information about the consumer from stating that the consumer owes any debt. If the consumer obligated or allegedly obligated to pay the debt is deceased and the debt collector is attempting to locate the person who is authorized to act on behalf of the deceased consumer's estate, the debt collector does not violate § 1006.10(b)(2) by stating that the debt collector is seeking to identify and locate the person who is authorized to act on behalf of the deceased consumer's estate.

Section 1006.14—Harassing, Oppressive, or Abusive Conduct

14(b) Repeated or continuous telephone calls or telephone conversations.

14(b)(1) In general.

1. *In general.* Section 1006.14(b)(1)(i) provides that, in connection with the collection of a debt, a debt collector must not place telephone calls or engage any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. Section 1006.14(b)(1)(ii) provides that, with respect to a debt collector who is collecting a consumer financial product or service debt, as defined in § 1006.2(f), it is an unfair act or practice under section 1031 of the Dodd-Frank Act to place telephone calls or engage any person in telephone conversation repeatedly or continuously in connection with the collection of such debt, such that the natural consequence is to harass, oppress, or abuse any person at the called number. For purposes of § 1006.14(b)(1)(i) and (ii), placing a telephone call includes conveying a ringless voicemail but does not include sending an electronic message (*e.g.,* a text message or an email) to a mobile telephone.

14(b)(2) Frequency limits.

Paragraph 14(b)(2)(i).

1. *Examples.* Section 1006.14(b)(2)(i) provides that, subject to § 1006.14(b)(3), a debt collector must not place a telephone call to a particular person more than seven times within seven consecutive days in connection with the collection of a particular debt. The following examples illustrate the rule.

i. On Wednesday, March 1, a debt collector first attempts to communicate with a consumer in connection with the collection of a debt by placing a telephone call and leaving a limited-content message on the consumer's voicemail. Between Thursday and Sunday, the debt collector places six more telephone calls to the consumer, all of which go unanswered. As of Sunday, the debt collector has placed seven telephone calls to the consumer in connection with the collection of the credit card debt within the period of seven consecutive days that started on Wednesday, March 1. Subject to § 1006.14(b)(3), the debt collector may place another telephone call to the consumer in connection with collection of the debt on Wednesday, March 8 but not before that date.

ii. On Tuesday, October 5, a debt collector first attempts to communicate with a particular third party for the purpose of obtaining location information about a consumer by placing a telephone call to that third party that goes unanswered. Subject to §§ 1006.10 and 1006.14(b)(3), the debt collector may place up to six more telephone calls to that third party for the purpose of obtaining location information about that consumer through Monday, October 11, unless the debt collector engages in a telephone conversation with the third party before that day. See § 1006.10(c) for further guidance concerning when a debt collector is prohibited from communicating with a person other than the consumer for the purpose of acquiring location information.

2. *Misdirected telephone calls.* Section 1006.14(b)(2)(i) limits the number of times a debt collector may place telephone calls to a particular person within seven consecutive days in connection with the collection of a particular debt. If, within a period of seven consecutive days, a debt collector attempts to communicate with a particular person by placing telephone calls to a particular telephone number, and the debt collector then learns that the telephone number is not that person's number, the calls that the debt

collector made to that number are not considered to have been calls to that person during that seven-day period for purposes of § 1006.14(b)(2)(i). For example:

i. Assume that a debt collector attempts to communicate with a consumer on Monday and Wednesday by placing one unanswered telephone call to a particular telephone number on each of those days. On Thursday, the debt collector learns that the telephone number belongs to someone else and that the consumer does not answer calls to that number. For purposes of § 1006.14(b)(2)(i), the debt collector has not yet placed any telephone calls to that consumer during that seven-day period.

Paragraph 14(b)(2)(ii).

1. *Examples.* Section 1006.14(b)(2)(ii) provides that, subject to § 1006.14(b)(3), a debt collector must not place a telephone call to a particular person in connection with the collection of a particular debt within a period of seven consecutive days after having had a telephone conversation with the person in connection with the collection of such debt. Section 1006.14(b)(2)(ii) also states that the date of the telephone conversation is the first day of the seven-consecutive-day period. The following examples illustrate the rule.

i. On Tuesday, April 11, a debt collector first attempts to communicate with a consumer in connection with the collection of a debt by placing a telephone call to the consumer that the consumer does not answer. On Friday, April 14, the debt collector again places a telephone call to the consumer and has a telephone conversation with the consumer in connection with the collection of the debt. Subject to § 1006.14(b)(3), the debt collector may not place a telephone call to the consumer in connection with the collection of that debt again until Friday, April 21.

ii. On Thursday, August 13, a consumer initiates a telephone conversation with a debt collector regarding a debt. Subject to § 1006.14(b)(3), the debt collector may not place a telephone call to the consumer in connection with the collection of that debt again until Thursday, August 20.

14(b)(3) Certain telephone calls excluded from the frequency limits.

Paragraph 14(b)(3)(i).

1. *Responsive calls.* Section 1006.14(b)(3)(i) provides that telephone calls placed to a person to respond to the person's request for information do not count toward, and are permitted in excess of, the frequency limits in § 1006.14(b)(2). Once the debt collector provides a response to a person's request for information, the exception in § 1006.14(b)(3)(i) does not apply to subsequent telephone calls placed by the debt collector to the person, unless the person makes another request.

2. *Example.* On Wednesday, October 4, a debt collector places a telephone call to a consumer. During the ensuing telephone conversation in connection with the collection of a debt, the consumer requests additional information about the debt that the debt collector does not have at the time of the call. While § 1006.14(b)(2) otherwise would prohibit the debt collector from placing a telephone call to the consumer again until Wednesday, October 11, § 1006.14(b)(3)(i) provides that the debt collector may place telephone calls to respond to the consumer's request for information before the following Wednesday. Assume further that the debt collector provides a response to the consumer's request on Friday, October 6. Thereafter, the exception in § 1006.14(b)(3)(i) does not apply to subsequent telephone calls placed by the debt collector to the consumer, unless the consumer makes another request.

Paragraph 14(b)(3)(ii).

1. *Prior consent.* See the commentary to § 1006.6(b)(4)(i) for guidance concerning a person giving prior consent directly to a debt collector.

2. *Example.* On Friday, April 5, a debt collector places a telephone call to a consumer. During the ensuing telephone conversation in connection with the collection of a debt, the consumer requests that the debt collector call back at a later time. While § 1006.14(b)(2) otherwise would prohibit the debt collector from placing a telephone call to the consumer again until Friday, April 12, § 1006.14(b)(3)(ii) provides that the debt collector may place telephone calls pursuant to the consumer's prior consent before the following Friday. Assume further that the debt collector calls the consumer back on Monday, April 8, and that they have a telephone conversation on that date. Thereafter, the exception in § 1006.14(b)(3)(ii) does not apply to subsequent telephone calls placed by the debt collector to the consumer, unless the consumer again provides prior consent directly to the debt collector.

Paragraph 14(b)(3)(iii).

1. *Unconnected telephone calls.* Section 1006.14(b)(3)(iii) provides that telephone calls placed to a person do not count toward, and are permitted in excess of, the frequency limits in § 1006.14(b)(2) if they do not connect to the dialed number. A debt collector's telephone call does not connect to the dialed number if, for example, the debt collector receives a busy signal or an indication that the dialed number is not in service. Conversely, a debt collector's telephone call connects to the dialed number if, for example, the call causes a telephone to ring at the dialed number but no one answers the call, or the call does not cause a telephone to ring but is connected to a voicemail or other recorded message.

2. *Example.* Section 1006.14(b)(3)(iii) provides that telephone calls placed to a person do not count toward, and are permitted in excess of, the frequency limits in § 1006.14(b)(2) if they do not connect to the dialed number. For example, on Thursday, February 2, a debt collector places a telephone call to a consumer about a credit card debt in response to which the debt collector receives a busy signal or an indication that the dialed number is not in service. That telephone call does not count toward the frequency limits in § 1006.14(b)(2). Subject to § 1006.14(b)(3), the debt collector may place seven more telephone calls to the consumer about that credit card debt through Wednesday, February 8, unless the debt collector engages in a telephone conversation with the consumer in connection with the collection of the debt before that day.

14(b)(5) Definition.

1. *Particular debt.* Section 1006.14(b)(2) limits the frequency with which a debt collector may place telephone calls to, or engage in telephone conversation with, a person in connection with the collection of a particular debt. Section 1006.14(b)(5) provides that, except in the case of student loan debt, the term particular debt means each of a consumer's debts in collection. For student loan debt, § 1006.14(b)(5) provides that the term particular debt means all student loan debts that a consumer owes or allegedly owes that were serviced under a single account number at the time the debts were obtained by the debt collector. The following examples illustrate the rule.

i. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. Subject to § 1006.14(b)(3), the debt collector may, within a period of seven consecutive days, place seven unanswered telephone calls to the consumer in connection with the collection of the medical debt, and seven unanswered telephone calls to the consumer in connection with the collection of the credit card debt.

ii. A debt collector is attempting to collect a medical debt and a credit card debt from the same consumer. On Monday, November 9, the debt collector engages in a telephone conversation with the consumer solely in connection with the collection of the medical debt, but the debt collector does not place any telephone calls to the consumer in connection with the collection of the credit card debt. Subject to § 1006.14(b)(3), the debt collector may not place a telephone call to the consumer in connection with the collection of the medical debt again until Monday, November 16. Subject to § 1006.14(b), however, the debt collector may place telephone calls to, and engage in a telephone conversation with, the consumer in connection with the collection of the credit card debt before Monday, November 16.

iii. A debt collector is attempting to collect three student loan debts that were serviced under a single account number at the time that they were obtained by the debt collector and that are owed or allegedly owed by the same consumer. All three debts are treated as a single debt for purposes of § 1006.14(b)(2). Subject to § 1006.14(b)(3), the debt collector may place seven telephone calls within seven days to the consumer in connection with the collection of the debts. If, however, the debt collector engages the consumer in a telephone conversation in connection with the collection of any of the debts, the debt collector may not place a telephone call to the consumer again during the same seven-day period in connection with the collection of any of the debts.

14(h) Prohibited communication media.

14(h)(1) In general.

1. *Communication media.* Section 1006.14(h) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of any debt through a medium of communication if the consumer has requested that the debt collector not use that medium to communicate with the

consumer. See comment 2(d)–1 for examples of communication media.

2. *Specific address or telephone number.* Within a medium of communication, a consumer may request that a debt collector not use a specific address or telephone number. For example, if a debt collector has two mobile telephone numbers on file for a consumer, the consumer may request that the debt collector not use either or both mobile telephone numbers.

Section 1006.18—False, Deceptive, or Misleading Representations or Means

18(e) Disclosures required.

1. *Communication.* A limited-content message, as defined in § 1006.2(j), is not a communication, as that term is defined in § 1006.2(d). Thus, a debt collector who leaves a limited-content message for a consumer need not make the disclosures required by § 1006.18(e)(1) and (2). However, if a debt collector leaves a voicemail message for a consumer that includes content in addition to the content described in § 1006.2(j)(1) and (2) and which directly or indirectly conveys any information regarding a debt, the voicemail message is a communication, and the debt collector is required to make the § 1006.18(e) disclosures. See the commentary to § 1006.2(d) and (j) for additional clarification regarding the definitions of ''communication'' and ''limited-content messages.''

18(e)(1) Initial communications.

1. *Example.* A debt collector must make the disclosure required by § 1006.18(e)(1) in the debt collector's initial communication with a consumer, regardless of whether that communication is written or oral, and regardless of whether the debt collector or the consumer initiated the communication. For example, assume that a debt collector who has not previously communicated with a consumer attempts to communicate with the consumer by leaving a limited-content message, as defined in § 1006.2(j), in the consumer's voicemail. After listening to the debt collector's limited-content message, the consumer initiates a telephone call to, and communicates with, the debt collector. Pursuant to § 1006.18(e)(1), because the consumer-initiated call is the ''initial communication'' between the debt collector and the consumer, the debt collector must disclose to the consumer during that telephone call that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

Section 1006.22—Unfair or Unconscionable Means

22(f) Restrictions on use of certain media.

Paragraph 22(f)(3).

1. *Consent to use employer-provided email address.* Section 1006.22(f)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address. The consumer could at any time, however, opt out of receiving emails at that address using instructions provided by a debt collector pursuant to § 1006.6(e), or otherwise request not to receive emails at that address pursuant to § 1006.14(h). See the commentary to § 1006.6(b)(4)(i) for additional guidance concerning a consumer giving prior consent directly to a debt collector.

2. *Receipt of email from employer-provided email address.* Section 1006.22(f)(3) prohibits a debt collector from communicating or attempting to communicate with a consumer using an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer, unless the debt collector has received directly from the consumer either prior consent to use that email address or an email from that email address. A debt collector who receives an email directly from a consumer from an email address provided by the consumer's employer may communicate or attempt to communicate with the consumer at that email address, even if the consumer's email does not provide prior consent to the debt collector. For example, assume a debt collector has provided to a consumer a validation notice pursuant to § 1006.34 but has not otherwise communicated or attempted to communicate with the consumer. Assume further that the consumer subsequently sends an email directly to the debt collector from an email address that the debt collector knows or should know is provided to the consumer by the consumer's employer; that the consumer's email requests additional information about the debt but does not give prior consent to the debt collector's use of that email address; and that the debt collector neither knows nor has reason to know that the consumer's employer prohibits the consumer from receiving communications in connection with the collection of a debt. Section 1006.22(f)(3) permits the debt collector to communicate or attempt to communicate with the consumer using that email address. The consumer could, however, subsequently opt out or request not to receive messages at that email address pursuant to §§ 1006.6(e) or 1006.14(h).

3. *Knowledge of employer-provided email address.* For purposes of § 1006.22(f)(3), a debt collector knows or should know an email address is provided to the consumer by the consumer's employer if, for example, the email address's top-level domain name is one ordinarily associated with work email addresses (*e.g.,* .gov or .mil), the email address's domain name includes a corporate name that is not commonly associated with non-work email addresses (*e.g., springsidemortgage.com*), or the debt collector knows the identity of the consumer's employer and the email address's domain name includes the employer's name or an abbreviation of the employer's name (*e.g.,* the debt collector knows that the consumer works at Example Mortgage Company and the email address is *examplemortgagecompany.com* or exmoc.com). In the absence of contrary information, a debt collector neither would know nor should know that an email address is provided to the consumer by the consumer's employer if the email address's domain name is one commonly associated with a provider of non-work email addresses.

Paragraph 22(f)(4).

1. *Social media.* Section 1006.22(f)(4) prohibits a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of a debt by a social media platform that is viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi). For example, § 1006.22(f)(4) prohibits a debt collector from posting, in connection with the collection of a debt, any message, including a limited-content message, for a consumer on a social media web page if that web page is viewable by the general public or the consumer's social media contacts. If a social media platform enables a debt collector to send a private message to the consumer that is not viewable by a person other than the persons described in § 1006.6(d)(1)(i) through (vi), however, § 1006.22(f)(4) does not prohibit a debt collector from communicating or attempting to communicate with a consumer in connection with the collection of a debt by sending such a private message to the consumer, including by sending a limited-content message, although §§ 1006.6(b) or 1006.14(h) nonetheless may prohibit the debt collector from sending such a private message if, for example, the consumer has requested that the debt collector not use that medium to communicate with the consumer.

Section 1006.30—Other Prohibited Practices

30(a) Communication prior to furnishing information.

1. *Communication.* Section 1006.30(a) prohibits a debt collector from furnishing information to a consumer reporting agency about a debt before communicating with the consumer about that debt. Pursuant to § 1006.2(d), a debt collector has communicated with the consumer about the debt if the debt collector conveys information regarding a debt directly or indirectly to the consumer through any medium. Pursuant to § 1006.2(d), a debt collector has not communicated with the consumer about the debt if the debt collector attempts to communicate with the consumer but no communication occurs. For example, a debt collector communicates with the consumer if the debt collector provides a validation notice to the consumer; a debt collector does not communicate with the consumer by leaving a limited-content message for the consumer. For additional clarification on providing disclosures in a manner that is reasonably expected to provide actual notice to consumers, see § 1006.42.

30(b) Prohibition on the sale, transfer, or placement of certain debts.

30(b)(1) In general.

30(b)(1)(i) FDCPA prohibition.

Paragraph 30(b)(1)(i)(C).

1. *Identity theft report filed.* Under § 1006.30(b)(1)(i)(C), a debt collector may not sell, transfer, or place for collection a debt if the debt collector knows or should know that an identity theft report was filed with respect to the debt. A debt collector knows or should know that an identity theft report was filed if, for example, the debt collector has received a copy of the identity theft report.

30(b)(2) Exceptions.

Paragraph 30(b)(2)(i).

1. *In general.* Under § 1006.30(b)(2)(i), a debt collector who is collecting a debt described in § 1006.30(b)(1)(i) may transfer the debt to the debt's owner. However, unless another exception under § 1006.30(b)(2) applies, the debt collector may not transfer the debt or the right to collect the debt to another entity on behalf of the debt owner.

Section 1006.34—Notice for Validation of Debts

34(a)(1) Validation information required.

1. *Deceased consumers.* Section 1006.34(a)(1) generally requires a debt collector to provide the validation information described in § 1006.34(c) either by sending the consumer a validation notice in a manner that satisfies § 1006.42(a), or by providing the information orally in the debt collector's initial communication. If the debt collector knows or should know that the consumer is deceased, and if the debt collector has not previously provided the validation information to the deceased consumer, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.34(a)(1). In such circumstances, to comply with § 1006.34(a)(1), a debt collector must provide the validation information to an individual that the debt collector identifies by name who is authorized to act on behalf of the deceased consumer's estate.

34(b) Definitions.

34(b)(3) Itemization date.

1. *In general.* Section 1006.34(b)(3) defines itemization date for purposes of § 1006.34. Section 1006.34(b)(3) states that the itemization date is any one of four potential references dates for which a debt collector can ascertain the amount of the debt. The four potential reference dates are the last statement date, the charge-off date, the last payment date, and the transaction date. A debt collector may select any of these dates as the itemization date to comply with § 1006.34. Once a debt collector uses a reference date for a specific debt in a communication with an individual consumer, the debt collector must use that reference date for that debt consistently when providing disclosures required by § 1006.34 to that consumer. For example, if a debt collector uses the last statement date to determine and disclose the account number associated with the debt pursuant to § 1006.34(c)(2)(v), the debt collector may not use the charge-off date to determine and disclose the amount of the debt pursuant to § 1006.34(c)(2)(viii).

Paragraph 34(b)(3)(i).

1. *Last statement date.* Under § 1006.34(b)(3)(i), the last statement date is the date of the last periodic statement or written account statement or invoice provided to the consumer. For purposes of § 1006.34(b)(3)(i), a statement provided by a creditor or a third party acting on the creditor's behalf, including a creditor's service provider, may constitute the last statement provided to the consumer.

Paragraph 34(b)(3)(iv).

1. *Transaction date.* Section 1006.34(b)(3)(iv) provides that the itemization date may be the date of the transaction that gave rise to the debt. The transaction date is the date that a creditor provided, or made available, a good or service to a consumer. For example, the transaction date for a debt arising from a medical procedure may be the date the medical procedure was performed, and the transaction date for a consumer's gym membership may be the date the membership contract was executed. In some cases, a debt collector may identify more than one potential transaction date. For example, a debt may have two transaction dates if a contract for a service is executed on one date and the service is performed on another date. If a debt has more than one transaction date, a debt collector may use any such date as the transaction date for purposes of § 1006.34(b)(3)(iv) but must use whichever transaction date it selects consistently, as described in comment 34(b)(3)–1.

34(b)(5) Validation period.

1. *Updated validation period.* Section 1006.34(b)(5) defines the validation period as the period starting on the date that a debt collector provides the validation information required by § 1006.34(a)(1) and ending 30 days after the consumer receives or is assumed to receive those disclosures. Section 1006.34(c)(3)(i) through (iii) requires statements that specify the end date of the validation period. If a debt collector sends a subsequent validation notice to a consumer because the consumer did not receive the original validation notice and the consumer has not otherwise received the validation information described in § 1006.34(c), the debt collector must calculate the end date of the validation period specified in the § 1006.34(c)(3) disclosures based on the date the consumer receives or is assumed to receive the subsequent validation notice. For example, assume a debt collector sends a consumer a validation notice on January 1, and that notice is returned as undeliverable. After obtaining accurate location information, the debt collector sends the consumer a subsequent validation notice on January 15. Pursuant to § 1006.34(b)(5), the end date of the validation period specified in the § 1006.34(c)(3) disclosures should be based on the date the consumer receives or is assumed to receive the validation notice sent on January 15.

34(c) Validation information.

34(c)(2) Information about the debt.

Paragraph 34(c)(2)(ii).

1. *Consumer's name.* Section 1006.34(c)(2)(ii) provides that validation information includes the consumer's name and mailing address. The consumer's name is what the debt collector reasonably determines is the most complete version of the name about which the debt collector has knowledge, whether obtained from the creditor or another source. It would be unreasonable for a debt collector to determine the consumer's name is the most complete version of the consumer's name if the debt collector has omitted name information in a manner that created a false, misleading, or confusing impression about the consumer's identity. For example, if the creditor provides the consumer's first name, middle name, last name, and name suffix to the debt collector, it would be unreasonable for the debt collector to not provide all of that information to the consumer.

Paragraph 34(c)(2)(iii).

1. *Merchant brand.* Section 1006.34(c)(2)(iii) provides that validation information includes the merchant brand, if any, associated with a credit card debt, to the extent that such information is available to the debt collector. For example, assume that a debt collector is attempting to collect a consumer's credit card debt. The credit card was issued by ABC Bank and was co-branded XYZ Store, and this information is available to the debt collector. The debt collector must provide the ''XYZ Store'' merchant brand information to the consumer.

Paragraph 34(c)(2)(v).

1. *Account number truncation.* Section 1006.34(c)(2)(v) provides that validation information includes the account number associated with the debt on the itemization date, or a truncated version of that number. If a debt collector uses a truncated account number, the account number must remain recognizable. For example, a debt collector may truncate a credit card account number so that only the last four digits appear on a validation notice.

Paragraph 34(c)(2)(viii).

1. *Amount of the debt on the itemization date.* Section 1006.34(c)(2)(viii) provides that validation information includes the amount of the debt on the itemization date. The amount of the debt on the itemization date includes any fees, interest, or other charges owed as of that date.

Paragraph 34(c)(2)(ix).

1. *Itemization of the debt.* Section 1006.34(c)(2)(ix) provides that validation information includes an itemization of the current amount of the debt in a tabular format reflecting interest, fees, payments, and credits since the itemization date. When providing a validation notice, a debt collector must include fields in the notice for all of these items even if none of the items have been assessed or applied to the debt since the itemization date. A debt collector may indicate that the value of a required field is ''0'' or ''N/A,'' or may state that no interest, fees, payments, or credits have been assessed or applied to the debt.

Paragraph 34(c)(2)(x).

1. *Current amount of the debt.* Section 1006.34(c)(2)(x) provides that validation information includes the current amount of the debt (*i.e.,* the amount as of when the validation information is provided). For residential mortgage debt subject to Regulation Z, 12 CFR 1026.41, a debt collector may comply with the requirement to provide the current amount of the debt by providing the consumer the total balance of the outstanding mortgage, including principal, interest, fees, and other charges.

34(c)(3) Information about consumer protections.

Paragraph 34(c)(3)(v).

1. *Electronic communication media.* Section 1006.34(c)(3)(v) provides that validation information includes a statement explaining how a consumer can take the actions described in § 1006.34(c)(4) and (d)(3), as applicable, electronically, if the debt collector provides the validation notice electronically. A debt collector may provide the information described by § 1006.34(c)(3)(v) by including the

statements, ''We accept disputes electronically at,'' using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(i), and ''We accept original creditor information requests electronically,'' using that phrase or a substantially similar phrase, followed by an email address or website portal that a consumer can use to take the action described in § 1006.34(c)(4)(ii). If a debt collector accepts electronic communications from consumers through more than one medium, such as by email and through a website portal, the debt collector is only required to provide information regarding one of these media but may provide information on any additional media.

Paragraph 34(c)(3)(vi).

1. *In general.* Section 1006.34(c)(3)(vi) provides that, for a validation notice delivered in the body of an email pursuant to § 1006.42(b)(1) or (c)(2)(i), validation information includes the opt-out statement required by § 1006.6(e). If a validation notice is delivered on a website pursuant to § 1006.42(c)(2)(ii), the validation notice need not contain the opt-out instructions because the consumer would have already received the opt-out instructions since those instructions are required for any email or text message that provides a hyperlink to the website where the notice is placed. Delivery of a validation notice that a debt collector previously provided pursuant to § 1006.42(b)(1) or (c)(2)(i) or (ii) is not rendered ineffective because a consumer opts out of future electronic communications.

34(c)(4) Consumer response information.

1. *Prompts.* If the validation information is provided in writing or electronically, a prompt described in § 1006.34(c)(4) may be formatted as a checkbox as in Model Form B–3 in appendix B.

34(c)(5) Special rule for certain residential mortgage debt.

1. *In general.* Section 1006.34(c)(5) provides that, for debts subject to Regulation Z, 12 CFR 1026.41, a debt collector need not provide the validation information described in § 1006.34(c)(2)(vii) through (ix) if the debt collector provides the consumer at the same time as the validation notice a copy of the most recent periodic statement provided to the consumer under 12 CFR 1026.41(b), and the debt collector refers to that periodic statement in the validation notice. A debt collector may comply with the requirement to provide a copy of the most recent periodic statement and the validation notice at the same time by, for example, including both documents in the same mailing. A debt collector may comply with the requirement to refer to the periodic statement in the validation notice by, for example, including in the validation notice the statement, ''See the enclosed periodic statement for an itemization of the debt,'' situated next to the information about the current amount of the debt required by § 1006.34(c)(2)(x). For debt subject to § 1006.34(c)(5), a debt collector need not include the itemization table described in § 1006.34(c)(2)(ix).

34(d) Form of validation information.

34(d)(1) In general.

Paragraph 34(d)(1)(ii).

1. *Permissible changes.* A debt collector may make certain changes to the content, format, and placement of the validation information described in § 1006.34(c) as long as the resulting disclosures are substantially similar to Model Form B–3 in appendix B of this part. Acceptable changes include, for example:

i. Modifications to remove language that could suggest liability for the debt if such language is not applicable. For example, if a debt collector sends a validation notice to a person who is authorized to act on behalf of the deceased consumer's estate (see comment 34(a)(1)–1), and that person is not liable for the debt, the debt collector may use the name of the deceased consumer instead of ''you.''

34(d)(2) Safe harbor.

1. *Safe harbor provided by use of model form.* Although the use of Model Form B–3 in appendix B of this part is not required, a debt collector who uses the model form, including a debt collector who delivers the model form electronically, complies with the disclosure requirements of § 1006.34(a)(1) and (d)(1). A debt collector who uses Model Form B–3 and includes the optional disclosures described in § 1006.34(d)(3) continues to be in compliance as long as those disclosures are made consistent with the instructions in § 1006.34(d)(3). A debt collector who uses Model Form B–3 also may embed hyperlinks if delivering the form electronically and continue to be in compliance as long as the hyperlinks are included consistent with § 1006.34(d)(4)(ii).

34(d)(3) Optional disclosures.

34(d)(3)(iv) Disclosures required by applicable law.

1. Section 1006.34(d)(3)(iv) permits a debt collector to include on the front of the validation notice a statement that other disclosures required by applicable law appear on the reverse of the validation notice and, on the reverse of the validation notice, any such required disclosures. Disclosures required by other applicable law may include, for example, disclosure requirements established by State statutes or regulations, as well as disclosures required by judicial decisions or orders. To comply with § 1006.34(d)(3)(iv), a debt collector may include in the validation notice a disclosure that is substantially similar to the language about other required disclosures that appears on Model Form B–3 in appendix B of this part and place any such required disclosures on the reverse of the validation notice, located above the consumer information section described in § 1006.34(c)(4).

34(d)(3)(vi) Spanish-language translation disclosures.

Paragraph 34(d)(3)(vi)(A).

1. *Customizing Spanish-language disclosure.* Section 1006.34(d)(3)(vi)(A) permits a debt collector to include supplemental information in Spanish that specifies how a consumer may request a Spanish-language validation notice. For example, a debt collector may include a statement in Spanish that a consumer can request a Spanish-language validation notice by telephone or email, if the debt collector chooses to accept consumer requests through those communication media.

34(e) Translation into other languages.

1. *In general.* Section 1006.34(e) permits a debt collector to satisfy § 1006.34(a)(1) by sending a consumer a validation notice accurately translated into any language, if the debt collector also sends an English-language validation notice in the same communication or has already provided an English-language validation notice. The language of a validation notice a debt collector obtains from the Bureau's website is considered a complete and accurate translation, although debt collectors are permitted to use other validation notice translations so long as they are complete and accurate.

Section 1006.38—Disputes and Requests for Original-Creditor Information

1. *Deceased consumers.* Section 1006.38 contains requirements related to disputes and requests for the name and address of the original creditor timely submitted in writing by the consumer. If the debt collector knows or should know that the consumer is deceased, and if the consumer has not previously disputed the debt or requested the name and address of the original creditor, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.38. In such circumstances, to comply with § 1006.38(c) or (d)(2), respectively, a debt collector must respond to a request for the name and address of the original creditor or to a dispute timely submitted in writing by a person who is authorized to act on behalf of the deceased consumer's estate.

2. *In writing.* Section 1006.38 contains requirements related to a dispute or request for the name and address of the original creditor timely submitted in writing by the consumer. A consumer has disputed the debt or requested the name and address of the original creditor in writing for purposes of § 1006.38(c) or (d)(2) if the consumer, for example:

i. Mails the written dispute or request to the debt collector;

ii. Returns to the debt collector the consumer response form that § 1006.34(c)(4)(i) requires to appear on the validation notice and indicates on the form a dispute or request;

iii. Provides the dispute or request to the debt collector using a medium of electronic communication through which a debt collector accepts electronic communications from consumers, such as an email address or a website portal; or

iv. Delivers the written dispute or request in person or by courier to the debt collector.

3. *Interpretation of the E-SIGN Act.* Comment 38–2.ii constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to section 809(b) of the FDCPA. Under this interpretation, section 101(a) of the E-SIGN Act enables a consumer to satisfy through an electronic request the requirement in section 809(b) of the FDCPA that the consumer's notification of the debt collector be ''in writing.'' Further, section 101(b) of the E-SIGN Act is not contravened because the consumer may only use a medium of electronic communication through which a debt collector accepts electronic communications from consumers.

38(a) Definitions.

38(a)(1) Duplicative dispute.

1. *Substantially the same.* Section 1006.38(a)(1) provides that a dispute is a duplicative dispute if, among other things, the dispute is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements of § 1006.38(d)(2)(i). A later dispute can be substantially the same as an earlier dispute even if the later dispute does not repeat verbatim the language of the earlier dispute.

2. *New and material information.* Section § 1006.38(a)(1) provides that a dispute that is substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector has already satisfied the requirements of § 1006.38(d)(2)(i) is not a duplicative dispute if the consumer provides new and material information to support the dispute. Information is new if the consumer did not provide the information when submitting an earlier dispute. Information is material if it is reasonably likely to change the verification the debt collector provided or would have provided in response to the earlier dispute. The following example illustrates the rule:

i. ABC debt collector is collecting a debt from a consumer and sends the consumer a validation notice. In response, the consumer submits a written dispute to ABC debt collector within the validation period asserting that the consumer does not owe the debt. The consumer does not include any information in support of the dispute. Pursuant to § 1006.38(d)(2)(i), ABC debt collector provides the consumer a copy of verification of the debt. The consumer then sends a cancelled check showing the consumer paid the debt. The cancelled check is new and material information.

38(d) Disputes.

38(d)(2) Response to disputes.

Paragraph 38(d)(2)(ii).

1. *Duplicative dispute notice.* Section 1006.38(d)(2)(ii) provides that, in the case of a dispute that a debt collector reasonably determines is a duplicative dispute, the debt collector must cease collection of the debt, or any disputed portion of the debt, until the debt collector notifies the consumer that the dispute is duplicative or provides a copy either of verification of the debt or of a judgment to the consumer. If the debt collector notifies the consumer that the dispute is duplicative, § 1006.38(d)(2)(ii) requires that the notice provide a brief statement of the reasons for the debt collector's determination that the dispute is duplicative and refer the consumer to the debt collector's response to the earlier dispute. A debt collector complies with the requirement to provide a brief statement of the reasons for its determination if the notice states that the dispute is substantially the same as an earlier dispute submitted by the consumer and the consumer has not included any new and material information in support of the earlier dispute. A debt collector complies with the requirement to refer the consumer to the debt collector's response to the earlier dispute if the notice states that the debt collector responded to the earlier dispute and provides the date of that response.

Section 1006.42—Providing Required Disclosures

1. *Deceased consumers.* Section 1006.42 contains requirements related to providing certain disclosures required by this part. If a debt collector knows or should know that a consumer is deceased, a person who is authorized to act on behalf of the deceased consumer's estate operates as the consumer for purposes of § 1006.42.

42(a) Providing required disclosures.

42(a)(1) In general.

1. *Notice of undeliverability.* Under § 1006.42(a)(1), a debt collector who provides disclosures required by this part in writing or electronically must, among other things, do so in a manner that is reasonably expected to provide actual notice. A debt collector who provides a required disclosure in writing or electronically and who receives a notice that the disclosure was not delivered has not provided the disclosure in a manner that is reasonably expected to provide actual notice under § 1006.42(a)(1). See comment 34(b)(5)–1 for how to calculate the updated validation period when sending a subsequent validation notice.

42(b) Requirements for certain disclosures provided electronically.

Paragraph 42(b)(1).

1. *Interpretation of the E-SIGN Act.* Section 1006.42(b)(1) constitutes the Bureau's interpretation of section 101 of the E-SIGN Act as applied to section 809 of the FDCPA. Under this interpretation, section 101(c) of the E-SIGN Act enables a debt collector to satisfy the requirement in section 809(a) of the FDCPA that the debt collector's notice be ''written,'' and to satisfy the requirement in section 809(b) of the FDCPA that the debt collector mail the consumer a copy of verification or a judgment, or the name and address of the original creditor, through an electronic notice if the consumer provides consent in accordance with the E-SIGN Act directly to the debt collector.

Paragraph 42(b)(2).

1. *Information identifying the debt.* Under § 1006.42(b)(2), a debt collector who provides the validation notice described in § 1006.34(a)(1)(i)(B), or the disclosures described in § 1006.38(c) or (d)(2), electronically must, among other things, identify the purpose of the communication by including, in the subject line of an email or in the first line of a text message transmitting the disclosure, the name of the creditor to whom the debt currently is owed or allegedly is owed and one additional piece of information identifying the debt, other than the amount. The following are examples of an additional piece of information, other than amount, identifying a debt: a truncated account number; the name of the original creditor; the name of any store brand associated with the debt; the date of sale of a product or service giving rise to the debt; the physical address of service; and the billing mailing address on the account.

Paragraph 42(b)(4).

1. *Disclosures responsive to smaller screens.* Under § 1006.42(b)(4), a debt collector who provides a validation notice electronically must provide the disclosure in a responsive format that is reasonably expected to be accessible on a screen of any commercially available size and via commercially available screen readers. A debt collector provides the validation notice in a responsive format accessible on a screen of any commercially available size if, for example, the notice adjusts to different screen sizes by stacking elements in a manner that accommodates consumer viewing on smaller screens while still meeting the other applicable formatting requirements in § 1006.34. A debt collector provides the validation notice in a manner accessible via commercially available screen readers if, for example, the validation notice is machine readable.

42(c) Alternative procedures for providing certain disclosures electronically.

Paragraph 42(c)(1).

1. *Effect of consumer opt out.* If a consumer has opted out of debt collection communications to a particular email address or telephone number by, for example, following instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address or telephone number to deliver disclosures under § 1006.42(c).

Paragraph 42(c)(2).

Paragraph 42(c)(2)(i).

1. *Body of an email.* The alternative procedures in § 1006.42(c) permit a debt collector to place a disclosure in the body of an email. A debt collector places a disclosure in the body of an email if the disclosure's content is viewable within the email itself.

42(d) Notice and opportunity to opt out of hyperlinked delivery.

1. *Communication covering multiple disclosures.* A debt collector's or a creditor's communication with a consumer pursuant to § 1006.42(d)(1) or (2), respectively, applies to all disclosures covered by § 1006.42(a) that the debt collector thereafter sends regarding that debt, unless the consumer later designates that email address or, in the case of text messages, that telephone number, as unavailable for the debt collector's use, such as by opting out pursuant to the instructions required by § 1006.6(e).

42(d)(1) Communication by the debt collector.

1. *Name of the consumer.* For purposes of a debt collector's communication with the consumer under § 1006.42(d)(1), the term ''name of the consumer'' has the same meaning as the term ''consumer's name'' under § 1006.34(c)(2)(ii). See comment 34(c)(2)(ii)–1.

2. *Debt collector communication covering multiple debts.* If a debt collector's communication with a consumer under § 1006.42(d)(1) applies to multiple debts, § 1006.42(d)(1)(i) and (ii) require the debt collector to identify the consumer and the creditor for each debt to which the communication applies.

3. *Form of communication with consumer before hyperlinked delivery.* A debt collector's communication with the consumer under § 1006.42(d)(1) must inform the consumer of, among other things, the consumer's ability to opt out of hyperlinked delivery of disclosures to an email address or, in the case of text messages, to a telephone number, and instructions for

opting out, including a reasonable period within which to opt out. This communication must, among other things, take place before the debt collector provides the hyperlinked disclosure, and the debt collector must allow the consumer a reasonable period within which to opt out. In an oral communication with the consumer, such as a telephone or in-person conversation, the debt collector may require the consumer to make an opt-out decision during that same communication. However, a written or electronic communication that requires the consumer to make an opt-out decision within a period of five or fewer days does not meet these timing criteria. Therefore, when using hyperlinked delivery for the validation notice required by § 1006.34, an oral communication, such as a telephone conversation or in-person conversation, is necessary under § 1006.42(d)(1).

4. *Combined notice concerning electronic communications and electronic delivery of disclosures.* An opt-out notice provided by a debt collector under § 1006.42(d)(1) may be combined with an opt-out notice provided by the debt collector under § 1006.6(d)(3)(i)(B)(*1*). See comment 6(d)(3)(i)(B)(*1*)–3.

42(d)(2) Communication by the creditor.

1. *Creditor communication covering multiple debts.* A creditor's communication with the consumer under § 1006.42(d)(2) may apply to multiple debts being placed with or sold to the same debt collector at the same time.

2. *Form of communication with consumer before hyperlinked delivery.* A creditor's communication with the consumer under § 1006.42(d)(2) must inform the consumer of, among other things, the consumer's ability to opt out of hyperlinked delivery of disclosures to an email address or, in the case of a text message, to a telephone number, and instructions for opting out, including a reasonable period within which to opt out. This communication must, among other things, take place no more than 30 days before the debt collector's electronic communication containing the hyperlink to the disclosure, and the creditor must allow the consumer a reasonable period within which to opt out. In an oral communication with the consumer, such as a telephone or in-person conversation, the creditor may require the consumer to make an opt-out decision during that same communication. However, a written or electronic communication that requires the consumer to make an opt-out decision within a period of five or fewer days does not meet these timing criteria.

3. *Combined notice concerning electronic communications and electronic delivery of disclosures.* An opt-out notice provided by a creditor under § 1006.42(d)(2) may be combined with an opt-out notice provided by the creditor under § 1006.6(d)(3)(i)(B)(*1*). See comment 6(d)(3)(i)(B)(*1*)–3.

42(e) Safe harbors.

42(e)(1) Disclosures provided by mail.

1. *Consumer's residential address.* Section 1006.42(e)(1) provides that a debt collector satisfies § 1006.42(a) if the debt collector mails a printed copy of a disclosure to the consumer's residential address, unless the debt collector receives a notification from the entity or person responsible for delivery that the disclosure was not delivered. For purposes of § 1006.42(e)(1), a disclosure is not mailed to the consumer's residential address if the debt collector knows or should know at the time of mailing that the consumer does not currently reside at that location.

42(e)(2) Validation notice contained in the initial communication.

1. *Effect of consumer opt out.* If a consumer has opted out of debt collection communications to a particular email address by, for example, following the instructions provided pursuant to § 1006.6(e), then a debt collector cannot use that email address to deliver disclosures under § 1006.42(e)(2).

Subpart C—[Reserved]

Subpart D—Miscellaneous

Section 1006.100—Record Retention

1. *Evidence of required actions.* Section 1006.100 requires a debt collector to retain evidence of compliance with this part. Thus, under § 1006.100, a debt collector must retain evidence that the debt collector performed the actions and made the disclosures required by this part. For example, a debt collector could retain:

i. Telephone call logs as evidence that the debt collector complied with the frequency limits in § 1006.14; and

ii. Copies or records of documents provided to the consumer as evidence that the debt collector provided the information required by §§ 1006.34 and 1006.38 and met the delivery requirements of § 1006.42.

2. *Methods of retaining records.* Retaining records that are evidence of compliance with this part does not require retaining actual paper copies of documents. The records may be retained by any method that reproduces the records accurately (including computer programs) and that ensures that the debt collector can easily access the records (including a contractual right to access records possessed by another entity).

3. *Recorded telephone calls.* Nothing in § 1006.100 requires a debt collector to record telephone calls. However, under § 1006.100, a debt collector who records telephone calls must retain the recordings if the recordings are evidence of compliance with this part.

Section 1006.104—Relation to State Laws

1. *State law disclosure requirements.* A disclosure required by applicable State law that describes additional protections under State law does not contradict the requirements of the Act or the corresponding provisions of this part.

Dated: May 6, 2019.

Kathleen L. Kraninger,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2019–09665 Filed 5–20–19; 8:45 am]

BILLING CODE 4810–AM–P

FEDERAL REGISTER

Vol. 84 Tuesday,
No. 98 May 21, 2019

Part IV

The President

Federal Register
Vol. 84, No. 98
Tuesday, May 21, 2019

Presidential Documents

Title 3—

The President

Proclamation 9886 of May 16, 2019

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and decided to adjust the imports of these steel articles by imposing a 25 percent ad valorem tariff on such articles imported from most countries.

3. In Proclamation 9705, I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232 of the Trade Expansion Act of 1962, as amended, with respect to such imports.

4. In August 2018, the Secretary informed me that while capacity utilization in the domestic steel industry had improved, it was still below the target capacity utilization level recommended by the Secretary in his report. Although imports of steel articles had declined since the imposition of the tariff, I was advised that they were still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level. Given that imports had not declined as much as anticipated and capacity utilization had not increased to that target level, I concluded that it was necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.

5. In the Secretary's January 2018 report, the Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey). As the Secretary explained in that report, Turkey was among the major exporters of steel to the United States for domestic consumption. To further reduce imports of steel articles and increase domestic capacity utilization, I determined in Proclamation 9772 of August 10, 2018 (Adjusting Imports of Steel Into the United States), that it was necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018. The Secretary advised me that this adjustment would be a significant step toward ensuring the viability of the domestic steel industry.

6. The Secretary has now advised me that, since the implementation of the higher tariff under Proclamation 9772, imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel

articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.

7. Given these improvements, I have determined that it is necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries. Maintaining the existing 25 percent ad valorem tariff on most countries is necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report.

8. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

9. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Clause 2 of Proclamation 9705, as amended, is revised to read as follows:

''(2)(a) In order to establish certain modifications to the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation and any subsequent proclamations regarding such steel articles.

(b) Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports covered by heading 9903.80.01, in subchapter III of chapter 99 of the HTSUS, shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as follows: (i) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union; (ii) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea; (iii) on or after 12:01 a.m. eastern daylight time on August 13, 2018, from all countries except Argentina, Australia, Brazil, South Korea, and Turkey; and (iv) on or after 12:01 a.m. eastern daylight time on May 21, 2019, from all countries except Argentina, Australia, Brazil, and South Korea. Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey covered by heading 9903.80.02, in subchapter III of chapter 99 of the HTSUS, shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018 and prior to 12:01 a.m. eastern daylight time on May 21, 2019. All steel articles imports covered by heading 9903.80.61, in subchapter III of chapter 99 of the HTSUS, shall be subject to the additional 25 percent ad valorem rate of duty established herein with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on the date specified in a determination by the Secretary

granting relief. These rates of duty, which are in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding three sentences.''.

(2) The text of U.S. note 16(a)(i) to subchapter III of chapter 99 of the HTSUS is amended by deleting ''Except as provided in U.S. note 16(a)(ii), which applies to products of Turkey that are provided for in heading 9903.80.02, heading 9903.80.01 provides'' and inserting the following in lieu thereof: ''Heading 9903.80.01 provides''.

(3) Heading 9903.80.02, in subchapter III of chapter 99 of the HTSUS, and its accompanying material, and U.S. note 16(a)(ii) to subchapter III of chapter 99 of the HTSUS, are deleted.

(4) Paragraphs (b), (c), and (d) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS are each amended by replacing ''headings 9903.80.01 and 9903.80.02'' with ''heading 9903.80.01''.

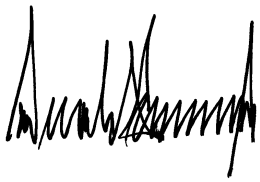
(5) The ''Article description'' for heading 9903.80.01 in subchapter III of chapter 99 of the HTSUS is amended by replacing ''of Brazil, of Turkey'' with ''of Brazil''.

(6) The modifications to the HTSUS made by clauses 1 through 5 of this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 21, 2019 and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(7) Any steel articles imports from Turkey that were admitted into a United States foreign trade zone under ''privileged foreign status'' as defined in 19 CFR 146.41, prior to 12:01 a.m. eastern daylight time on May 21, 2019, shall be subject upon entry for consumption on or after such time and date to the ad valorem rate of duty in heading 9903.80.01 in subchapter III of chapter 99 of the HTSUS.

(8) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of May, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.



[FR Doc. 2019–10759
Filed 5–20–19; 11:15 am]
Billing code 3295–F9–P

Presidential Documents

Proclamation 9887 of May 16, 2019

To Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974

By the President of the United States of America

A Proclamation

1. In Executive Order 11888 of November 24, 1975, the President designated Turkey as a beneficiary developing country for purposes of the Generalized System of Preferences (GSP) (19 U.S.C. 2461 *et seq.*).

2. Pursuant to section 502(d)(1) of the Trade Act of 1974, as amended (the ''1974 Act'') (19 U.S.C. 2462(d)(1)), the President may withdraw, suspend, or limit the application of the duty-free treatment accorded under the GSP with respect to any beneficiary developing country. In taking any action under section 502(d)(1) of the 1974 Act, the President shall consider the factors set forth in sections 501 and 502(c) of the 1974 Act (19 U.S.C. 2461 and 2462(c)).

3. Section 502(c)(2) of the 1974 Act (19 U.S.C. 2462(c)(2)) provides that, in determining whether to designate any country as a beneficiary developing country, the President shall take into account, among other factors, the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors that the President deems appropriate.

4. Consistent with section 502(d)(1) of the 1974 Act, and having considered the factors set forth in sections 501 and 502(c), I have determined that, based on its level of economic development, it is appropriate to terminate Turkey's designation as a beneficiary developing country effective May 17, 2019.

5. Section 502(f)(2) of the 1974 Act (19 U.S.C. 2462(f)(2)) requires the President to notify the Congress and the affected beneficiary developing country, at least 60 days before termination, of the President's intention to terminate the affected country's designation as a beneficiary developing country, together with the considerations entering into such decision. I notified the Congress and Turkey on March 4, 2019, of my intent to terminate Turkey's designation, together with the considerations entering into my decision.

6. Pursuant to section 203 of the 1974 Act (19 U.S.C. 2253), and after receiving a report from the International Trade Commission prepared under section 202 of the 1974 Act (19 U.S.C. 2252), the President may implement a measure in the form of a safeguard to address increased imports of articles that are a substantial cause of serious injury to a domestic industry producing like or directly competitive products. When acting pursuant to section 203 of the 1974 Act, the President shall take action that he determines will facilitate efforts of the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

7. In Proclamation 9693 of January 23, 2018, I, pursuant to section 203 of the 1974 Act, implemented a safeguard measure on imports of certain crystalline silicon photovoltaic (CSPV) cells, whether or not partially or fully assembled into other products (including, but not limited to, modules, laminates, panels, and building-integrated materials) (''CSPV products''). In Proclamation 9694 of January 23, 2018, I, pursuant to section 203 of the

1974 Act, implemented a safeguard measure on imports of large residential washers.

8. The safeguard measures implemented by Proclamations 9693 and 9694 exempt imports of covered products from developing countries that are Members of the World Trade Organization (WTO), including Turkey, if such a country's individual share of total imports of the product does not exceed 3 percent and if imports of all such countries with less than 3 percent import share do not collectively account for more than 9 percent of total imports of the product.

9. Consistent with my determination that it is appropriate to terminate the designation of Turkey as a beneficiary developing country under the GSP, effective May 17, 2019, I have determined to remove it from the list of developing country WTO Members exempt from application of the safeguard measures on CSPV products and large residential washers. To reflect Turkey's removal from the list, I have determined that it is appropriate to revise subdivision (b)(2) of U.S. note 17 and subdivision (b) of U.S. note 18 to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTS) to delete the references to Turkey.

10. Section 604 of the 1974 Act (19 U.S.C. 2483) authorizes the President to embody in the HTS the substance of the relevant provisions of the 1974 Act, and of other Acts affecting import treatment, and actions thereunder, including removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including title V and sections 203 and 604 of the 1974 Act, do hereby proclaim that:

(1) The designation of Turkey as a beneficiary developing country is terminated, effective May 17, 2019.

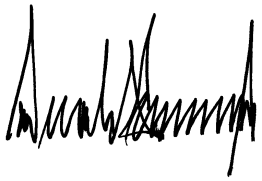
(2) To reflect this termination, general notes 4(a) and 4(d) and pertinent subheadings of the HTS are modified as set forth in Annex A to this proclamation.

(3) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

(4) The exemption for Turkey from application of the safeguard measures on CSPV products and large residential washers is removed, effective May 17, 2019.

(5) To reflect this revision, subdivision (b)(2) of U.S. note 17 and subdivision (b) of U.S. note 18 to subchapter III of chapter 99 of the HTS are each modified as set forth in Annex B to this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of May, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.



Billing code 3295–F9–P

Annex A

To Modify the Harmonized Tariff Schedule of the United States to remove Turkey from the Generalized System of Preferences

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 17, 2019, the Harmonized Tariff Schedule of the United States (HTS) is modified for the following subheadings:

1. General note 4(a) to the Harmonized Tariff Schedule of the United States (HTS) is modified:

   A. By deleting from the list of independent countries the name "Turkey";

2. General note 4(d) to the HTS is modified:

   A. By striking the following subheadings and the country set out opposite them:

0710.80.50 Turkey	2008.99.28 Turkey	6802.21.10 Turkey
0711.90.30 Turkey	2515.12.20 Turkey	6802.91.20 Turkey
0802.51.00 Turkey	2810.00.00 Turkey	6802.91.25 Turkey
0804.20.60 Turkey	2819.10.00 Turkey	7413.00.10 Turkey
0813.10.00 Turkey	2833.29.40 Turkey	7413.00.50 Turkey
0910.99.40 Turkey	2840.11.00 Turkey	7413.00.90 Turkey
1806.20.22 Turkey	2840.19.00 Turkey	
1901.20.05 Turkey	6801.00.00 Turkey	

   B. By deleting the country "Turkey" set out opposite the following HTS subheadings:

2008.50.20	2918.22.10	7408.19.00
2009.89.65	7113.19.50	

3. The following HTS subheadings are modified by deleting from the rates of duty 1 – special subcolumn, the symbol "A*" and by inserting in lieu thereof "A":

0710.80.50	2008.99.28	6802.21.10
0711.90.30	2515.12.20	6802.91.20
0802.51.00	2810.00.00	6802.91.25
0804.20.60	2819.10.00	7413.00.10
0813.10.00	2833.29.40	7413.00.50
0910.99.40	2840.11.00	7413.00.90.
1806.20.22	2840.19.00	
1901.20.05	6801.00.00	

Annex B

Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 17, 2019, the Harmonized Tariff Schedule of the United States (HTS) is modified as follows:

Subdivision (b)(2) of U.S. note 17 and subdivision (b) of U.S. note 18 to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTS) are each modified by deleting from the list of developing countries the name "Turkey".

[FR Doc. 2019–10761
Filed 5–20–19; 11:15 am]
Billing code 7020–02–C

FEDERAL REGISTER

Vol. 84 Tuesday,
No. 98 May 21, 2019

Part V

The President

Federal Register
Vol. 84, No. 98
Tuesday, May 21, 2019

Presidential Documents

Title 3—

The President

Proclamation 9888 of May 17, 2019

Adjusting Imports of Automobiles and Automobile Parts Into the United States

By the President of the United States of America

A Proclamation

1. On February 17, 2019, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effects of imports of passenger vehicles (sedans, sport utility vehicles, crossover utility vehicles, minivans, and cargo vans) and light trucks (collectively ''automobiles'') and certain automobile parts (engines and engine parts, transmissions and powertrain parts, and electrical components) on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. The report found that automotive research and development (R&D) is critical to national security. The rapid application of commercial breakthroughs in automobile technology is necessary for the United States to retain competitive military advantage and meet new defense requirements. Important innovations are occurring in the areas of engine and powertrain technology, electrification, lightweighting, advanced connectivity, and autonomous driving. The United States defense industrial base depends on the American-owned automotive sector for the development of technologies that are essential to maintaining our military superiority.

3. Thus, the Secretary found that American-owned automotive R&D and manufacturing are vital to national security. Yet, increases in imports of automobiles and automobile parts, combined with other circumstances, have over the past three decades given foreign-owned producers a competitive advantage over American-owned producers.

4. American-owned producers' share of the domestic automobile market has contracted sharply, declining from 67 percent (10.5 million units produced and sold in the United States) in 1985 to 22 percent (3.7 million units produced and sold in the United States) in 2017. During the same time period, the volume of imports nearly doubled, from 4.6 million units to 8.3 million units. In 2017, the United States imported over 191 billion dollars' worth of automobiles.

5. Furthermore, one circumstance exacerbating the effects of such imports is that protected foreign markets, like those in the European Union and Japan, impose significant barriers to automotive imports from the United States, severely disadvantaging American-owned producers and preventing them from developing alternative sources of revenue for R&D in the face of declining domestic sales. American-owned producers' share of the global automobile market fell from 36 percent in 1995 to just 12 percent in 2017, reducing American-owned producers' ability to fund necessary R&D.

6. Because ''[d]efense purchases alone are not sufficient to support . . . R&D in key automotive technologies,'' the Secretary found that ''American-owned automobile and automobile parts manufacturers must have a robust presence in the U.S. commercial market'' and that American innovation capacity ''is now at serious risk as imports continue to displace American-owned production.'' Sales revenue enables R&D expenditures that are necessary for long-term automotive technological superiority, and automotive

technological superiority is essential for the national defense. The lag in R&D expenditures by American-owned producers is weakening innovation and, accordingly, threatening to impair our national security.

7. In light of all of these factors, domestic conditions of competition must be improved by reducing imports. American-owned producers must be able to increase R&D expenditures to ensure technological leadership that can meet national defense requirements.

8. The Secretary found and advised me of his opinion that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that these imports are ''weakening our internal economy'' and that ''[t]he contraction of the American-owned automotive industry, if continued, will significantly impede the United States' ability to develop technologically advanced products that are essential to our ability to maintain technological superiority to meet defense requirements and cost effective global power projection.''

9. The Secretary therefore concluded that the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

10. In reaching this conclusion, the Secretary considered the extent to which import penetration has displaced American-owned production, the close relationship between economic welfare and national security, *see* 19 U.S.C. 1862(d), the expected effect of the recently negotiated United States-Mexico-Canada Agreement (USMCA), and what would happen should the United States experience another economic downturn comparable to the 2009 recession.

11. In light of the report's findings, the Secretary recommended actions to adjust automotive imports so that they will not threaten to impair the national security. One recommendation was to pursue negotiations to obtain agreements that address the threatened impairment of national security. In the Secretary's judgment, successful negotiations could allow American-owned automobile producers to achieve long-term economic viability and increase R&D spending to develop cutting-edge technologies that are critical to the defense industry.

12. I concur in the Secretary's finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

13. I have also considered the renegotiated United States-Korea Agreement and the recently signed USMCA, which, when implemented, could help to address the threatened impairment of national security found by the Secretary.

14. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to take action to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. If that action is the negotiation of an agreement contemplated in 19 U.S.C. 1862(c)(3)(A)(i), and such an agreement is not entered into within 180 days of the proclamation or is not being carried out or is ineffective, then the statute authorizes the President to take other actions he deems necessary to adjust imports and eliminate the threat that the imported article poses to national security. *See* 19 U.S.C. 1862(c)(3)(A).

15. I have decided to direct the United States Trade Representative (Trade Representative) to pursue negotiation of agreements contemplated in 19 U.S.C. 1862(c)(3)(A)(i) to address the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate, and to update me on the progress of such negotiations

within 180 days. Under current circumstances, this action is necessary and appropriate to remove the threatened impairment of the national security.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim as follows:

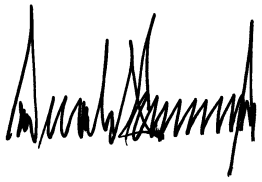
(1) The Trade Representative, in consultation with the Secretary, the Secretary of the Treasury, and any other senior executive branch officials the Trade Representative deems appropriate, shall pursue negotiation of agreements contemplated in 19 U.S.C. 1862(c)(3)(A)(i) to address the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate.

(2) Within 180 days of the date of this proclamation, the Trade Representative shall update me on the outcome of the negotiations directed under clause (1) of this proclamation.

(3) The Secretary shall continue to monitor imports of automobiles and certain automobile parts and shall, from time to time, in consultation with any senior executive branch officials the Secretary deems appropriate, review the status of such imports with respect to the national security. The Secretary shall inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232 of the Trade Expansion Act of 1962, as amended.

(4) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of May, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.



[FR Doc. 2019–10774
Filed 5–20–19; 11:15 am]
Billing code 3295–F9–P

Presidential Documents

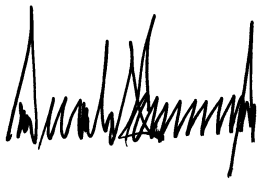
Notice of May 20, 2019

Continuation of the National Emergency With Respect to the Stabilization of Iraq

On May 22, 2003, by Executive Order 13303, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq.

The obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared in Executive Order 13303, as modified in scope and relied upon for additional steps taken in Executive Order 13315 of August 28, 2003, Executive Order 13350 of July 29, 2004, Executive Order 13364 of November 29, 2004, Executive Order 13438 of July 17, 2007, and Executive Order 13668 of May 27, 2014, must continue in effect beyond May 22, 2019. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to the stabilization of Iraq declared in Executive Order 13303.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,

May 20, 2019.

[FR Doc. 2019–10777

Filed 5–20–19; 11:15 am]

Billing code 3295–F9–P

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Federal Register

Vol. 84, No. 98

Tuesday, May 21, 2019

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CFR PARTS AFFECTED DURING MAY

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LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

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